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In the Supreme Court of the United States

OCTOBER TERM, 1934

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF OREGON, DEFENDANT

BRIEF OF THE DEFENDANT, THE STATE OF OREGON

JURISDICTION

The State of Oregon concedes the jurisdiction of this Court over the parties and the subject matter.

STATEMENT

The Report of the Special Master filed herein on October 15, 1934, sets forth on pages 1-16, inclusive, (except those portions thereof embraced in Defendant's Exceptions* numbered 1 and 61) on page 19, Table on page 22, page 25 (except that portion thereof embraced in Defendant's Exception numbered 45), page 26, page 27 (except that part thereof embraced in Exception numbered 60), pages 28-30,

*Wherever the words "Defendant's Exceptions" are used in this brief or the word "Exceptions," it is intended to refer unless otherwise specifically stated to the numbered Exceptions of the State of Oregon filed herein, the printed designation of which is: **Defendant's Exceptions to the Report of the Special Master.** The word "Report" refers to the Report of the Special Master filed herein Oct. 15, 1934.

page 31 (except that part embraced in Defendant's Exceptions numbered 64, 65, 68 and 69), and page 32, certain facts of this case accurately and succinctly presenting issues involved herein and such facts need no repetition herein. We will briefly elaborate some of the facts involved.

The excerpts from the cases cited by the Special Master in his Report and quoted on pages 17-19, 23-24, 29-30, 33-34, 36, 38-40, 43-51, 59-61 and 64 thereof are correct citations.

An index to the Fact Questions presented by the Special Master is found on page ii of his Report.

All of the facts and tabulations contained in the Report of the Special Master: Volume 2 are correct.

The following proposed Findings contained in the Report of the Special Master, pages 73-131, are correct except as challenged by Defendant's Exceptions filed herein, to-wit, I-IV, V (except that part thereof embraced in Defendant's Exception numbered 1), VI (except that part thereof embraced in Defendant's Exception numbered 130), VII-XIV, XV (except an addition should be made to that portion thereof designated "(d)" as suggested in Defendant's Exception numbered 111), XVI (except those parts thereof embraced in Defendant's Exceptions numbered 131, 133, XVIII (except that part thereof embraced in Defendant's Exception numbered 23), XIX, XX (except that part thereof embraced in Defendant's Exception numbered 24), XXII (except those parts embraced in Defendant's Exceptions numbered 49, 46), XXIV (except those parts thereof embraced in Defendant's Exceptions numbered 25, 26) XXV (except that part thereof embraced in Exception numbered 70), XXVI, XXVII (except those parts thereof

embraced in Defendant's Exceptions numbered 108, 13).

Paragraphs 1, 6, 7, 8, 9 (except that part embraced in Defendant's Exception numbered 51), 10 and 16 of the proposed Decree recommended by the Special Master in his Report, pages 132-137, are substantially accurate, except paragraph 1 should have stated that the areas were held in trust for the future state. The other paragraphs of the proposed Decree are challenged in Defendant's Exceptions filed herein.

The State of Oregon asserts title to the beds of Malheur and Harney Lakes, Mud Lake and a connecting channel between Malheur and Mud Lake known as The Narrows. There have been a number of surveys in the general vicinity of and adjacent to these lakes all of which are indicated upon Plaintiff's Exhibit 3, and shown on Appendix 3, the plate opposite page 1 of the Report of the Special Master filed herein. In 1881 the Sand Reef at the easterly end of Harney Lake broke through or was cut through during the high water period and vast quantities of water flowed into Harney Lake. The matter came before the Department of the Interior, the Pacific Live Stock Co. vs. Armack, 30 Land Decisions 521, and subsequently thereto that department entered into a contract with John H. Neal, a surveyor of Harney County in which the lakes were situated, numbered 634 for the survey of lands between the lands surveyed in the prior surveys of Malheur Lake, Mud Lake and The Narrows and the then present shore line of the lakes and to establish a new meander line in accordance with his contract and the instructions of the government at mean high water mark

or line. The survey was made, field notes and plats prepared, accepted, approved and filed, and based upon such field notes and surveys and such plats, the government has by unrestricted grants and patents, all without reservations, conveyed all of the uplands on the meander of Mud Lake and The Narrows, and 79.80% of the uplands on the meander line of Malheur Lake; the lands on the meander line in the eastern and southeastern part of Malheur Lake have never been conveyed or patented because such uplands have been substantially worthless and but very little of the uplands bordering the meander line of Harney Lake has been patented, as these lands also are worthless. Records of the John H. Neal survey, referred to in the record as the survey and meander of 1895 were introduced in evidence herein as Plaintiff's Exhibits 38, 39A to 39K, 40 and 41. The lands still owned by the United States and never granted away in the eastern part of Malheur Lake and on Harney Lake are shown as *uncolored* on Exhibit 21.

The 1895 survey of John H. Neal, before it was accepted, was checked by a field inspector of the General Land Office. It was the subject of a Special report. Exhibit X-10 (Abs. p. 262). The field notes, plats and surveys were approved and patents have been made at all times subsequently in accordance with such surveys and plats. Exhibit X-5. (Abs. P. 111-132). The government has never sought to impeach this second or last survey. Copies of the field notes, plats and instructions to John H. Neal were offered in evidence by the government in this case.

The State of Oregon has never by judicial decision recognized ownership in the riparian owner to

the beds of navigable streams or navigable waters, except pursuant to legislative grant (except certain wharf rights not involved in this case), and has never recognized any title other than that obtained by the riparian owner by the addition of land by permanent accretion or reliction on lakes alleged or conceded by both parties in *private litigation* to be non-navigable.

The State of Oregon having a great many lakes situated within its boundaries (Defendant's Exhibit X-3; Plaintiff's Exhibit 56, Abs. p. 875-889), instead of waiting for the slow determination by judicial decision, asserted by legislative acts its ownership of the beds of all meandered lakes which it declared navigable and public waters. (Amended Answer, p. 33-41). The state deemed it inimical to public policy and the public interest to hand over to the riparian owner the beds of lakes, and asserted its title thereto, following therein the example of many other states, and cases from which states are hereinafter in this brief presented and discussed.

A comprehensive array of legal problems with reference to the title to lands under waters is presented by the record. *The State of Oregon is not an upland or riparian owner on Malheur Lake* (Appendix 4, opposite p. 6 of the Report), but about 79.80% of all the uplans have passed into private ownership, the *United States still retaining about 20.20% of the uplands*, mostly worthless sand and alkali lands.

On the Narrows Division, *Oregon owns the frontage on both sides of the stream westerly of the Narrows bridge;* that easterly of the bridge has passed into private ownership. (Appendix 5, opposite p. 8 of

the Report). *The United States owns no uplands on this Division.*

On the Mud Lake Division, Oregon *owns uplands and being about* 72.31 *chains out of a total of* 808.94 *chains* or about 8.99% of the total length; private parties including Harney county, a political subdivision of Oregon, being one of such riparian owners, owning the balance. (Appendix 6 opposite p. 10 of the Report). The *United States owns no uplands on this Division.*

On the Sand Reef Division *most of the uplands is still retained by the United States.* Certain lots, indicated in blue on Appendix 7, opposite p. 12 of the Report, were created by a survey which was not approved until after the Executive Order was issued; *the question is presented did these lots pass as school lands to Oregon.*

On Harney Lake certain lots in the northeasterly and southerly sides of the lake, indicated in blue on Appendix 8, opposite p. 16 of the Report, were created by a survey which was not approved until after the Executive Order was issued and the same question is presented as in the Sand Reef Division; and certain lots on the northwesterly side of the lake, likewise indicated in blue on said Appendix 8,passed to Oregon as school lands, and Oregon used the deficiencies in said section 36, as base for selection of lieu lands elsewhere, and the question is presented what is the legal effect of the use of such base.

Hence the problem in each Division is different, and if the lakes are held to be non-navigable herein, what is the effect of such ownership of uplands and the effect of the grants on the title to the beds of

the lakes as a whole and secondly to those portions of the beds fronting granted uplands.

Omission of Necessary Parties. The State of Oregon contends that this court should make an order bringing in the riparian owners shown on Plaintiff's Exhibit 22, and the claimants to the bed of the lakes shown on the same Exhibit and further tabulated in Appendix 14, Report of the Special Master: Volume 2, pages 74-80, so that the legal questions involved herein, for the settlement of which this suit has been brought, may be completely determined and the entire controversy settled, such owners and claimants being necessary and indispensable parties herein, and that this court should if it deems it necessary for the complete jurisdiction of the *res* make an order appointing a Receiver of the area involved as it did in Oklahoma vs. Texas, 258 U. S. 574.

See: Defendant's Exceptions filed herein, numbered 82, 102, 103, 104, 134, 135, 136, 137 and 138.

Supplement to Report of the Special Master, pp. iii-v.

Argument of counsel before Special Master filed herein, pp. 2667-2668.

The main questions of law involved have been carefully set forth in the Report of the Special Master and indexed by him on pages ii, iii and iv of his Report and numbered (1) to (10), inclusive. The defendant has arranged this Brief in accordance with the classification of "Questions of Fact" and "Questions of Law" involved as presented by the Special Master in his Report, as the logical method

of presenting this case and to test the accuracy of the Report, and to ascertain wherein it is erroneous, and to lessen the difficult task of analyzing the many questions of fact and law presented by the testimony of 143 witnesses and voluminous exhibits.

The Exceptions filed by the State of Oregon have for the same reason been divided into the classifications used by the Special Master, and the subject matter of the Exceptions has been placed, so far as practicable, under such respective classification headings; this has presented some difficulties in arrangement as such Exceptions are necessarily drawn from three sources, the Report proper (pp. 1-72), the proposed Findings (pp. 73-132) and the proposed Decree (pp. 132-137). Some of the questions might be classified under several of the headings of subject matter adopted by the Special Master but the arrangement used, we believe, is logical and practicable.

SPECIFICATION OF ERRORS

The Specification of the Errors assigned are in most instances set forth in Defendant's Exceptions to the Report of the Special Master filed herein, classified under the headings adopted by the Special Master in his Report, and will be presented under the same headings in this brief. In support of the various Exceptions on questions of fact, the defendant has given in the concluding part of the Exceptions the *names of the witnesses* relied on, the *page* of the Joint Abstract of Record supporting the fact claims made and the *particular line* on such respective pages cited in support of the defendant's contentions as to what the true facts are. We trust this will lead to

clarity and succinctness of statement and saving of time.*

The State of Oregon, in its Exceptions filed herein specifies as error each of the findings and conclusions of the Special Master upon the Questions of Fact as set forth in his report, numbered (1), (2) and (3). Report of the Special Master, pp. 14, 16, 17, 25. The State of Oregon, also specifies as error his failure to answer the Question of Fact numbered (5), in the negative. Report, pp. 14, 28. It also specifies as error his failure to answer the Question of Fact numbered (6), in the affirmative. Report, pp. 14, 31.

The State of Oregon, in its Exceptions filed herein specifies as error the findings and conclusions of the Special Master upon each of the Questions of Law set forth in his Report, numbered (1) to (10) inclusive. Report of the Special Master, pp. 15, 33, 36, 37, 52, 54, 55, 61, 62, 63 and 64.

We have set forth in this brief in the Summary of Argument what the State of Oregon submits should have been found.

SUMMARY OF ARGUMENT

The argument in this brief has been arranged in the order of: A—Questions of fact numbered (1) to (6), (Special Mater's Report, p. ii), and B—Questions of Law numbered (1) to (10), (Id. pp. ii, iii, iv). The position of the State of Oregon presented in this brief in dealing with each of such questions

*It would facilitate the work of the court if the lines on the pages are numbered in the Court's copies of the Abstract, as many different and unrelated subjects are frequently found on the same page, not germane to the particular point of fact presented or Exception urged.

and numbered in the order used by the Special Master is as follows:

A

(1) The area involved constituted lands under navigable waters, and prior to the admission of Oregon into the Union, the United States held title thereto *in trust* for the future state.

(2) The area involved constituted navigable waters (in fact) on February 14, 1859, when Oregon was admitted into the Union.

(3) There were no stable lands constituting islands and/or promontories within the area involved on February 14, 1859.

(4) The meander line laid down by J. H. Neal was a correct line. Furthermore it is not challenged in the pleadings of the United States herein.

(5) There were no relicted lands within the Meander Line Boundary at the commencement of the suit.

(6) All the grants made by the United States to lands bordering upon the Meander Line Boundary are comparable in form to those involved in Hardin vs. Jordan (Defendant's Exhibit X-5, Abs. pp. 111-132), except that in the case of school sections and lieu lands, no patent was issued, the grant being in effect the provisions of the statutes under which title passed to the state. (See Report of the Special Master pp. 31-32).

B

(1) The rule of the common law under the decision by this Court in Hardin vs. Jordan that the effect of conveyances of lands bordering on a meandered lake is that the grantee takes to the center of the lake, is not in force in Oregon; the local law pro-

vides that the grantee takes only to the water's edge.

(2) The rule declared in Hardin v. Jordan that a grantee of lands bordering on a meandered lake takes to the center of the lake, is a rule not applicable to lakes of the size and character of Malheur and Harney Lakes.

(3) The rule in Oregon limits the grantee to the water's edge, and the title from the water's edge to the center of a non-navigable lake passes to the State of Oregon to that portion at least of the bed or beds of the lakes fronting the uplands which have been granted without restrictions or reservations of terms in the grants.

(4) The same rule of riparian rights (no more, no less) applying to upland owners on meandered lakes in Oregon applies to owners of the school sections and indemnity lands taken in lieu of deficiencies in school sections abutting on such meander line.

(5) If the state uses the deficiency within the meandered lake or fractional sections of school lands bordering upon such lake as a base for lieu lands, the same rule would apply as to the use of such base on navigable waters, and in any event the state would not lose title to any lands other than the quantity actually used as base.

(6) Oregon claims that it was within its jurisdiction by judicial decisions and/or statute to assert title to the lands within the Meander line Boundary, and that its statutes are valid and effective therefor.

Oregon further claims that where the United States grants the uplands on a correctly meandered non-navigable lake without reservations or restrictions in terms, it is within the power of the State to declare the waters

in front of such granted lands navigable and public, and to assert ownership and sovereignty over the bed and to preserve its control.

(7) The State of Oregon claims that the executive order of August 18, 1908, was ultra vires and invalid. The State of Oregon further claims that the executive order of August 18, 1908, a copy of which is set forth in the Report of the Special Master opposite page 1 of said Report purports upon its face only to embrace "all smallest legal subdivisions" which touch the shore line of Lakes Malheur and Harney, together with all islands and unsurveyed lands within the meander lines of said lakes, and that it was only the surveyed lands touching the shore line of the lakes under the designation "the smallest legal subdivisions" which were reserved, and that therefore unsurveyed lands bordering such lakes were not reserved under said Malheur Lake Reservation, and therefore the State of Oregon acquired the title to school Section 36 as soon as the lands were surveyed, which was done subsequently in 1912 in T. 27 S. R. 29½ E., and T. 26 S. R. 30 E. (See Appendix 8 opposite page 16 of the Report of the Special Master, and Appendix 7 opposite page 12 of the Report of the Special Master).

(8) The State of Oregon claims that the lands in Section 36 passed to the State of Oregon though the survey thereof was approved subsequently to the creation of the Malheur Lake Reservation, for the reason that the executive order of August 18, 1908, so far as it attempted to reserve lands bordering the shores of said lake from entry applied only to the "all smallest legal subdivisions"

namely *lands then* (to-wit, on August 18, 1908) *surveyed.*

(9) This Court should make an order bringing in the riparian owners shown on plaintiff's Exhibit 22 and the claimants to the bed of the lake shown on said Exhibit 22, and tabulated in Appendix 14, Report of the Special Master: Volume 2, pages 74-80, so that the legal questions involved herein may be completely determined, and the entire controversy settled in this suit, such owners and claimants being necessary and indispensable parties herein. This court should not enter a final decree until all necessary and indispensable parties are before it.

(10) The rule that a plaintiff in a suit to quiet title must recover upon the strength of his own title is applicable in this case, and applying such rule to this case if this court holds the waters involved in this suit to be non-navigable, then the plaintiff can recover title to only so much of the beds of the lakes as front unpatented, vacant public lands upon the meander line of such lakes, which vacant public lands are shown upon Appendix 4 opposite page 6, Appendix 7 opposite page 12, Appendix 8 opposite page 16 of the Report of the Special Master filed herein, and are described in Appendix 11 found on pages 57 to 65 inclusive, of the Report of the Special Master: Volume 2 filed herein.

ARGUMENT

A

(1) Was the Area Involved, i. e. the Land and Overlying Water Within the Meander Line Boundary, Property of the United States upon the Admission of Oregon into the Union February 14, 1859?

(Report of the Special Master, p. 16)

Exception 1

United States prior to statehood has power to grant lands below high water mark or navigable waters, whenever it becomes necessary to do so:

a. In order to perform international obligations; or

b. To effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states; or

c. To carry out other public purposes appropriate to the objects for which the United States hold the territory.

But, the United States has never undertaken by general laws to dispose of such lands.

Shively vs. Bowlby, 152 U. S. 1, 48; 38 L. Ed. 331, 2; 14 Sup. Ct. Rep. 548, 570.

Brewer Elliott Oil & Gas Co. vs. U. S., 260 U. S. 77, 84; 67 L. Ed. 140, 144; 43 Sup. Ct. Rep. 60, 65.

U. S. vs. Holt State Bank, 270 U. S. 49, 54; 70 L. Ed. 465, 468; 46 Sup. Ct. Rep. 197, 198.

The extent of the prerogative of the State of Oregon over lands under navigable waters is for it to determine.

Shively vs. Bowlby, 152 U. S. 1, 46; 38 L. Ed. 331, 348; 14 Sup. Ct. Rep. 548, 565.

Lands underlying navigable waters belong to the respective state in which situated by virtue of their sovereignty and may be used and disposed of as they may direct, subject to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce.

Each new State upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones.

Scott vs. Lattig, 227 U. S. 229, 242-3; 57 L. Ed. 490, 496; 33 Sup. Ct. Rep. 242, 243.

Hence it depends upon the law of the state whether the beds of navigable waters are owned by the state or whether the title is in the riparian owners.

Archer vs. Greenevill Gravel Company, 233 U. S. 60, 68; 58 L. Ed. 508, 583; 34 Sup. Ct. Rep. 567, 570.

Norton vs. Whiteside, 239 U. S. 144, 153; 60 L. Ed. 186; 36 Sup. Ct. Rep. 97.

Scott vs. Lattig, supra.

The nature of the state's title to lands under navigable waters, and the limitations and qualifications of the rule as stated in the Illinois water front case, is given in the following cases:

Illinois Central Railroad Company vs. Illinois, 146 U. S. 387, 36 L. Ed. 1018; 13 Sup. Ct. Rep. 110.

Long Sault Development Co. vs. McCall, 242 U. S. 272, 278; 61 L. Ed. 294; 37 Sup. Ct. Rep. 79.

Appleby vs. New York, 271 U. S. 364; 70 L. Ed. 992; 46 Sup. Ct. Rep. 569.

In brief the State of Oregon asserts the areas involved underlay navigable waters when the state was admitted into the Union and the United States merely held the title *in trust* for the future State, and Excep-

tion numbered 1 is correct and the statement of the Special Master to which such exception is made should be qualified.

(2) Did the Area Involved Constitute Navigable Waters (in fact) on February 14, 1859?
(Report of the Special Master, p. 17).

What constitutes navigable waters of the United States? The Special Master disposes of this question on pages 17 and 18 of his Report by quoting three leading cases by this court. But one of the purposes of the present litigation between the United States and the State of Oregon is that the court may clarify the law as to intrastate or wholly inland lakes which are not susceptible to use for *water borne trade or travel over and from such lakes across state lines.* The state of Oregon, and other states, is vitally interested in knowing what is the law applicable to the large number of its inland lakes, such as those described by the naturalist Stanley G. Jewett. See pages 24, 126 and 127 of the Report of the Special Master, the subject matter of Defendant's Exceptions 12 and 12 herein. The State of Oregon, as well as the other states in the Union which have many lakes entirely land locked therein, has spent vast sums in stocking these lakes with fish and making the same available for the use of the public, and has distinctly repudiated doctrines as to lakes similarly to those held applicable in her sister state of Washington and a few similar states. The State of Oregon, as well

as other states, is vitally interested in knowing whether this court will adopt a rule of law which will convert all these lakes now used by the public into *private ponds* under the doctrine of Bristow vs. Cormican L. R. 3 App. Cas. 641, which case was this court's authority for its declaration in Hardin vs. Jordan of the common law ownership by the riparian owner to the center of a non-navigable lake, thereby destroying the *public right of fishery therein* and the *public right of hunting thereon and boating or navigation.* If the common law as established in Bristow vs. Cormican and approved in Hardin vs. Jordan, applies, there are no public or navigable lakes except those that come within the commercial test. Hence we are asking the court to clarify herein what it meant by the following definitions of navigable waters, *definitions not repeated* in recent cases by this court, some of which are cited by the Special Master on pages 17 and 18 of his Report.

Navigable Waters of the United States as Contradistinguished from Navigable Waters of the State

The foregoing discussion accordingly brings up for consideration two problems, namely, first the fact that this court has recognized the distinction between what it notes as *navigable waters of the United States* (where it has applied the rule hereinabove set forth) and *navigable waters of the state;* and secondly what is the effect of a patent or patents from the Government to lands bordered by a meander line of a stream or lake, which grants or patents are without reservations of any kind; and as we shall see this Court has held that the determination of the effect of such a grant by the United States of lands upon a meandered

stream or lake is determined by the law of the state in which the land is situated, irrespective of whether the waters so meandered are navigable waters of the United States, navigable waters of the state or are non-navigable waters.

One of the earliest and certainly the leading case in the early history of this Court, in defining what constitutes a navigable water of the United States, pointing out that there is a distinction between such waters and the navigable waters of the states is the case of The Daniel Ball vs. U. S. 77 U. S. 557, (10 Wall.) 563, 19 L. Ed. 999, 1001. The Supreme Court stated in this case as follows:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in *contradistinction from the navigable waters of the States*, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

This holding is reiterated in Robert W. Parson, 191 U. S. 17, 26, 48 L. Ed. 73, 77.

This doctrine is again set out by this court in The Montello (1871, 78 U. S., 11 Wall.) 411, 415, 20 L. Ed. 191, 192, Mr. Justice Field pointed out the distinction between navigable waters of the United

States and navigable waters of a state in the following language, page 415:

> "If, however, the river is not of itself a highway for commerce with other states or foreign countries, or does not form such highway by its *connection with other waters*, and is only navigable between different places within the state, then it is not a *navigable water* of the United States *but only a navigable water of the state.*"

In Donnelly vs. U. S. 228 U. S. 243, 262, 57 L. Ed. 820, 828, 33 Sup. Ct. Rep. 449, 455, this court said:

> "The question of the navigability in fact of non-tidal streams is sometimes a doubtful one. It has been held in effect that what are navigable waters of the United States, within the meaning of the act of Congress, in contradistinction to the navigable waters of the States, depends upon whether the stream in its ordinary condition affords a channel for useful commerce.
>
> "But it results from the principles already referred to that what shall be deemed *a navigable water within the meaning of the local rules of property is for the determination of the several states.* Thus the State of California, if she sees fit, may confer upon the riparian owners the title to the bed of any navigable stream within her borders."

When this court comes to determine the question of navigability in passing upon Federal questions it will use the Federal rule, but when it comes to pass upon the question of the title to the bed under water, it (at least where the upland has been unreservedly patented since statehood) will follow the rule announced by the state.

This court has recognized in the recent case of U. S. vs. Utah, 283 U. S. 64, 75, 75 L. Ed. 844, 849, 51

Sup. Ct. 438, 440, the distinction between navigable waters of the United States and navigable waters of the state in the following expression:

> "The question of navigability is thus determinative of the controversy and that is a federal question. This is so, although it is undisputed that none of the portions of the rivers under consideration constitute navigable waters of the United States, that is, they are not navigable in interstate or foreign commerce, and the question is whether they are *navigable waters of the state of Utah.* State laws cannot affect *titles vested in the United States.*"

In the Utah case the government was a meander line owner on the non-navigable portions of the streams and owner of unpatented uplands and so owned the bed.

In The Montello, 87 U. S. (20) Wall. p. 441-442, 22 L. Ed 391, 394, this court said:

> "The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market."
>
> "It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce, affords the true criterion of the navigability of a river, rather than the extent and manner of its use. If it is capable in its natural state for being used for purposes of commerce no matter in what mode the commerce may be

conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said (Rowe v. Bridge Co., 21 Pick., 344), "Every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable; but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

. . . . In this quotation we note the court refers to the Massachusetts case of Rowe vs. Bridge Co., 21 Pick, 344; but see Attorney General vs. Woods, 108 Mass. 436. The language in the Rowe case with reference to "fishing skiffs or gunning canoes" is said in the latter case not to be an enumeration of the uses to which waters must be applied to give them the character of navigability. "If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purpose of trade or agriculture. The purpose of the navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation."

We have never been able to understand the reasoning, which states that a lake is not navigable in the Federal sense, unless its waters alone, or in connection with other waters, are susceptible of trade and travel between the several states. It would seem that commerce can be carried in part over a wholly intra state lake or river, thence by public highways or railroads

across state lines, and thence to market either across other navigable waters or other transportation agencies. It is perfectly apparent that different tribes of Indians might live within a state and wholly intra state navigable waters be used as the means of intercourse and commerce between them. Why should not such a lake or river be navigable in the Federal sense though wholly intra state?

It was held in The Katie, 40 Fed. 480, 489, that if "the navigable waters of a state, wholly within the state, and with no exterior water connection, are yet utilized under 'common control, management or arrangements' in connection with railroads, for 'continuous carriage,' in other words for interstate commerce,—for the purposes of such commerce,— they would become *public waters* of the United States and subject to Congressional control under the Commerce clause (Paragraph 3, Section 8, Article I) of the Constitution, if not under the Admiralty Clause. See act of February 4, 1887, entitled 'An Act to regulate Commerce.' " There is no intimation in Ex parte Garnett, 141 U. S. 1, 35 L. Ed. 631, 11 Sup. Ct. Rep. 840, that this is not a correct statement of law.

In the Holt State Bank case it was held:

> . . . . . That navigability does not depend on the particular mode in which such use is or may be had,—whether by steamboats, sailing vessels or flatboats,—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

We have had occasion and opportunity since the trial of this case to examine the Quarterly of the Oregon Historical Society, Volume 11, referred to by Dr.

R. C. Clark. (Abs. p. 1015, l. 41; p. 1017, l. 28), and in the description of the occurrences of November 3, 1826, at the lakes described by Dr. Clark, this journal states (page 208):

> "It is incredible the number of Indians in this quarter. We cannot go 10 yards without finding them. Huts generally of grass of a size to hold 6 or 8 persons. No *Indian nation* so numerous as these in all North America. I include both Upper and Lower Snakes, the latter as wild as deer, fit subjects for the missionary who could twist them in any form they pleased. What a field for the society; one equal to it not to be found. They lead a most wandering life."

The journal then describes the privations they were forced to endure. The journal of November 1st, wherein the fresh and salt lakes are described, refer to the fact that

> "Buffalo have been here and heads are to be seen. Fowl in abundance but very shy."

Dr. Clark does not mention in his testimony that in the Journal of November 4th wherein it is noted that Mr. Kay returned after being sent on a scouting expedition, it is stated:

> "Mr. Kay and party arrived with the following accounts—no beaver; same level country a *chain of lakes of fresh water.*"

The same journal of Peter Skene Ogden, shows that on June 8, 1827 he was again at the end of the Salt Lake, (page 221). This is the same day referred to in the testimony of Dr. Clark (Abs. p. 1018, l. 5). The following statements are found in his journal of June 12th:

> "During my illness the trappers have not been idle, collecting 74 beaver; but the Snakes are most numerous and daring, determined to steal

horses. The natives have destroyed in this region upwards of 60,000 beaver, not one of which reached our forts."

From the foregoing of which the court will take judicial notice, with the story and references to the Indian wars in the record in this vicinity of the lake, we suggest that there is plenty of evidence to establish that these lakes were susceptible and for many years after Oregon was admitted into the Union continued to be susceptible as a highway for commerce between the white man and with the Indian tribes; and if the Federal test of navigability is related to the Commerce clause of the constitution, that same commerce clause which is so frequently referred to with reference to susceptibility for navigation between a state and a foreign nation and between the several states, also gives Congress jurisdiction of such waters as are susceptible for the use of trade "with the Indian tribes." Constitution, Art. I, Sec. 8, Subd. 3.

It would appear that the government's contention in the present case is that no body of water is navigable unless it is used or susceptible of being used in interstate commerce. In other words, an inland lake which by virtue of its expanse of water and the depth of the lake would be capable of floating the largest ocean liners, cannot be construed as navigable waters, the beds of which inure to the state by virtue of its sovereignty when admitted to the Union, unless such lakes afford a useful channel for commerce between the several states or between a state and foreign nations. We respectfully suggest that we are aware of no decision of this court which holds that a state did not acquire title to the lake which has such a navigable capacity merely because the lake is an inland

lake. We also respectfully suggest that a lake is *susceptible* of commerce if it has a navigable capacity because no court can say that such a lake may not in the future be connected by a railroad or a highway upon which trade and commerce may proceed from the shores of such lake to the borders of or into another state. There are a large number of inland lakes in Oregon upon the shores of which are ranches, and over the waters of which lakes, gasoline boats having a considerable draft carry eggs, butter and other dairy products and which are taken from the farms to shipping points or to creameries, from which the products are distributed not only to places in Oregon but in interstate commerce; butter and dairy products particularly, are shipped to adjoining states. Such a lake, in the judgment of the State of Oregon is a navigable body of water and the title inured to the State of Oregon when it was admitted to the Union. Harney County, with an elevation of over 4,000 feet has been deprived to date of the use of lands around Malheur and Mud Lakes for dairy products and these particular lakes may not be used for that purpose, yet it is very clear in this case that the waters of the lake have been useful for the taking of skins from fur-bearing animals which have gone into interstate commerce. True, the pelts were not shipped entirely by water from the lake to other states but they were taken over the waters of this lake, carried by vehicle to shipping points and railroads and there placed in commerce the same as other pelts from other regions of the country have gone into commerce. (Abs. p. 714-724). This surely is trade in the commercial sense, and within this sense Malheur, Harney and Mud Lakes are and at all times have been susceptible of trade

and commerce. This Court has held that it is not the *nature of the boat* nor the *necessary depth of the water* that controls, and certainly this Court must take judicial knowledge that a body of water such as involved in this case is susceptible of use for the transportation of these particular products of commerce, namely in the fur bearing trade.

Accordingly we take the position that these Oregon lakes wholly intra-state and inland, (*though having no water outlet for water borne trade or travel*) may still be navigable waters in spite of the early cases to the contrary, and we seem to be justified in this conclusion by the holding of this Court in United States vs. Utah, 283 U. S. 64. Was it not then an unimportant circumstance that a stream led out of Mud Lake into Thief River which in turn flowed into Canada, the navigability of which lake was settled in United States vs. Holt State Bank, 258 U. S. 574. If that fact be of no importance, then Mud Lake in the Holt State Bank case is analogous to the lakes involved in the case at bar, and if Mud Lake in that case was navigable as this court held it was, then the lakes involved in the case at bar are navigable under every test.

This court stated in the Holt State Bank case:

> "The evidence set forth in the record is voluminous and in some respects conflicting. When the conflicts are resolved according to familiar rules we think the facts shown are as follows: In its natural and ordinary condition the lake was from 3 to 6 feet deep. When meandered in 1892, and when first known by some of the witnesses, it was an open body of clear water. Mud River traversed it in such way that it might well be characterized as an (57) enlarged section of that

stream. Early visitors and settlers in that vicinity used the river and lake as a route of travel, employing the small boats of the period for the purpose. The country about had been part of the bed of the glacial Lake Agassiz and was still swampy, so that waterways were the only dependable routes for trade and travel. Mud River, after passing through the lake, connected at Thief river with a navigable route extending westward to the Red River of the North and thence northward into the British possessions. Merchants in the settlements at Liner and Grygla, which were several miles up Mud river from the lake, used the river and lake in sending for and bringing in their supplies. True, the navigation was limited but this was because trade and travel in that vicinity were limited. In seasons of great drought there was difficulty in getting boats up the river and through the lake, but this was exceptional, the usual conditions being as just stated. Sand bars in some parts of the lake prevented boats from moving readily all over it, but the bars could be avoided by keeping the boats in the deeper parts or channels. Some years after the lake was meandered, vegetation such as grows in water got a footing in the lake and gradually came to impede the movement of boats at the end of each growing season, but offered little interference at other times. Gasoline motor boats were used in surveying and marking the line of the intended ditch through the lake, and the ditch was excavated with floating dredges."

Our conclusion is that the evidence requires a finding that the lake was navigable within the approved rule before stated. From this it follows that no prejudice resulted from the recognition below of the local rule respecting navigability."

The Holt State Bank case merely reaffirms the doctrine announced by the Court in the Economy Light

& Power Company vs. U. S. 256 U. S. 113, 123, 65 L. Ed. 847, 854, 41 Sup. Ct. Rep. 409, 412, and in Brewer-Elliott Oil & Gas Co. vs. U. S. 260 U. S. 77, 87, 67 L. Ed. 140, 145, 43 Sup. Ct. Rep. 60, 64.

We direct attention to the fact that in Toledo Liberal Shooting Co. vs. Eric Shooting Club (6 C. C. A. 1898), 90 Fed. 680, 682, the facts showed that the area involved was *not a lake* but lands *surveyed* and *patented* to the state as *swamp lands*. The case is in no wise an authority that the title to the bed of the shallower portions of a true lake are to be construed in accordance with one rule and the deeper portions of the bed in accordance with another rule. This case is cited by the Special Master on page 18 of his Report.

Likewise Harrison vs. Fite, (8 C. C. A. 1906), 148 Fed. 781, 784, cited by the Special Master on page 19 of his Report, did not involve an area at all comparable to Mud Lake in the Holt State Bank case or the lakes in the case at bar. We discuss this case elsewhere in this report.

The cases of United States vs. Utah, 283 U. S. 64, 75 L. Ed. 844, 51 Sup. Ct. Rep. 438, Economy Light & Power Company vs. U. S. 256 U. S. 113, 65 L. Ed. 847, 41 Sup. Ct. Rep. 409, and United States vs. Holt State Bank, 270 U. S. 49, 70 L. Ed. 465, 46 Sup. Ct. Rep. 197, are conclusive determinations by this court that to constitute a *navigable body of water* it is not necessary that the body be navigable over the *entire bed at all seasons of the year* or at *all stages of the water*. Certainly the description of Mud Lake as given by this Court in the Holt State Bank Case, describes a lake that is similar to the Mud Lake involved in this case and Malheur Lake. The only difference

between the Mud Lake involved in the Holt State Bank case and the Mud, Malheur and Harney Lakes involved in this case, is the fact that a small flowing stream led out of the Mud Lake involved in the Holt State Bank case and connected with another stream over which little boats could be propelled on the surface of the water from the United States into the Dominion of Canada. The navigable capacity of the Mud Lake involved in the Holt State Bank case was only about five thousand acres. The open waters alone, and unaffected substantially by any green vegetation of Malheur Lake is more than four times that area. Harney Lake is likewise four times that area, and Mud Lake in this case measureably approaches the Mud Lake in the Holt State Bank case. The only difference in the present case is that now at least Malheur River does not flow out of Malheur Lake as the early explorers thought it did or pictured it did, through Malheur Gap, affording a channel for the passage of boats from Malheur Lake to Malheur River then to the Snake River and thence to the Columbia. We still respectfully submit that with the advent of good roads on which merchandise, such as dairy products are carried in trucks, that the lakes involved in this case, were and when normal water returns are *as susceptible of navigation for trade and commerce* by using the lakes as a connecting link between the farmer and the common carrier that traverses the roads as was Mud Lake in the Holt State Bank case. Commerce is still commerce, though carried in part upon a river, upon a lake or upon a public highway or upon a railroad or upon a steamboat traversing the ocean. Commerce is frequently made up of all of these links. Decisions of this Court

illustrate the necessity of land portages. See Economy Light & Power Co. case supra. Actual use is not the criterion, in other words, *susceptibility of use*, in the decisions of this court have an equally significant meaning.

In the case of Churchill Company vs. Kingsbury, 178 Cal. 554, 174 Pac. 329, the suit involved the title, *consisting of a wide strip*, which in ordinary seasons was covered during the period of *high water* to a depth of about *three feet* and was *uncovered* by the *water at its low stages*. The land thus annually uncovered was very fertile and susceptible of cultivation without further reclamation than such as would be necessary to exclude the water of the lake from it. The lake was said to be navigable, whether within the federal definition or the state definition, does not appear. The court stated, (178 Cal. 558, 174 Pac. 330):

> "The title of the state extends not only to the land underlying that part of a navigable stream or body of water over which navigation may be conducted, but extends to the entire bed and in particular to the land which is covered and uncovered by the ordinary rise and fall of the tide, stream or lake."

If this court holds, under the doctrine of United States vs. Utah, that a stream or lake may constitute navigable waters of the United States, though wholly inland, and navigation thereon wholly intrastate, then the State of Oregon, submits that the area involved was navigable in fact when Oregon was admitted into the Union and ever since, except for temporary periods due to unusual drouth conditions and which we now have every reason to believe are ended.

Accordingly we proceed to the discussion of argu-

ment and findings of the Special Master, as exemplified in

Exceptions 2-41 *Inclusive*

NAVIGABILITY IN FACT

Exceptions 2 to 11, inclusive, embrace generally the State of Oregon's Exceptions to the general conclusions of the Special Master that the area involved was not navigable in fact when Oregon was admitted into the Union.

Exceptions 12 *and* 13 show *all the lakes* in Oregon which will be affected adversely to the interests of the State of Oregon by the decision herein in event the Master's conclusions are accepted by this court.

The Findings of the Special Master referred to in Exceptions 2-41 are based upon his interpretation of the evidence with reference to the following fact questions:

(i) Trapping and Fur Bearing Trade.

This is analyzed in *Exception* 14.

(ii) Boating and Navigation.

This is analyzed in *Exceptions* 15, 16, 17, 31, 32, 35, 36.

(iii) Depths of the water of the lakes.

This is analyzed in *Exception* 18 and the subdivisions thereunder classified by letters (a) to (s) inclusive, covering the evidence showing the different places bordering and in the area involved where witnesses have observed the waters of the lakes during high water seasons. The elevations thereof are readily determined from the contour lines on the government's survey contour maps, Plaintiff's Exhibits 3, 3A, 4 and 4A.

(iv) Different degrees of depth, (shallow and deeper portions not in compact areas found by the Special Master) in the area involved.

This is presented by *Exception* 19. This has been held to be a circumstance of no importance in Hardin v. Jordan, 140 U. S. 371, Economy Light & Power Co. v. U. S. 256 U. S. 113, United States v. Holt State Bank, 270 U. S. 49, and in many other state cases cited in this brief.

(v) Transportation of commodities.

This is analyzed in *Exceptions* 14, 15, 20, 32, *and* 33.

(vi) The recital that the lakes involved are non-navigable made by departments and courts wherein the question was not in controversy for judicial determination and in which proceedings and cases the State of Oregon was not a party.

This is the subject matter of *Exceptions* 21 *and* 22.

(vii) Records of army officers and explorers; maps introduced (Plaintiff's Exhibits 23 to 32 inclusive) during testimony of R. C. Clarke, mainly designed to show that the Sand Reef at the east end of Harney Lake had broken through prior to 1881, and thereby lowered the water level of the areas to the easterly thereof, so that the water did not have a height greater than that of 4093, the mean elevation of the Neal Meander line above mean sea level.

These matters are analyzed under *Exceptions* 23 *and* 25.

(viii) Have the lakes involved always been shallow lakes as pleaded in Plaintiff's Complaint and not exceeding, largely, elevation 4093 as found by the Special Master?

This question is analyzed under *Exceptions* 18, 24, 25, 26, 27, 28, 29 *and* 30.

(ix) What effect has irrigation had upon the waters of the area involved?

This question is analyzed under *Exception* 33 and somewhat under *Exceptions* 31 *and* 32.

(x) Have the areas involved been the habitat from the beginning of large quantities of game birds?

The allegations of the Complaint and the admissions of the answer settle this question in the affirmative contrary to the findings of the Special Master. (See Bill of Complaint p. 8; Amended Answer p. 9-10).

This question is analyzed in *Exception* 15 *subdivisions* (3) *and* (10) *and Exception* 34. (Amended Answer p. 25, 26).

(xi) Has the United States patrolled the area with boats propelled by oars and gasoline engines, and conducted the public thereon in such boats on pleasure trips and for the purposes of sight-seeing?

This fact question found contrary to the contention of the State of Oregon, is analyzed in *Exception* 37.

(xii) Should the Special Master have found navigablility (in fact) as requested by the State of Oregon as to the area involved? (Report of the Special Master pp. 127-128, Finding XXVIII).

This legal question is submitted by *Exceptions* 38, 39, 40 *and* 41 and the facts justifying the request are disclosed by the testimony of the witnesses whose names are given in Exceptions 2-41, inclusive, above referred to, with references to the Joint Abstract of Record supporting the references. The law is given in the cases submitted in this brief.

Discussion of Fact Questions i-xii, Supra

We will now discuss these fact questions relating to navigability (in fact), presented by Defendant, the State of Oregon's Exceptions 14-41, inclusive. A reference to the witnesses supporting our contentions, with citations to *page* and *line* of the Joint Abstract of Record is given in the Exceptions. We shall give a brief statement of the *ultimate facts* proven by the references cited. The detailed evidence of what each witness testified to is obtainable from the specific references. In the following discussion we emphasize the importance of reading the evidence with the *contour maps* before the court, (Plaintiff's Exhibits 3, 3A, 4 and 4A) which maps are based upon a precise survey by the United States herein and give the contour elevations of the beds of the lakes involved, and the adjacent surveyed lands, abutting on the meander line boundary. The elevations are with reference to the distance above mean sea level. Thus the mean elevation of the Neal meander line is 4093 feet above such sea level and the lowest part of Malheur Lake is 4088.8 feet above such sea level all as shown on such contour maps.

Hence, when we find a witness describing any particular place where the waters of the lakes came to, or which is flooded, or submerged in spring seasons, by examining the contour maps the court can immediately find the elevation of the water of the lake and the depth of the lake at the particular time and place specified by the witnesses. In this connection it is to be noted that Harney County was sparsely populated and some of the witnesses saw the lakes only infrequently in the years, some were out on the lakes

only a few times. Some few, during a limited period, saw the lakes frequently. The evidence shows most of the witnesses observed the area within the boundary line during the fall and winter seasons, and were not there during the usual spring seasons of high water.

(i) Trapping and Fur Bearing Trade. (*Defendant's Exception* 14.)

The Special Master correctly states that the State of Oregon attaches weight and significance to the evidence relating to *trapping.* Courts have always given great weight to the testimony of witnesses engaged in the fur bearing trade, the early trappers and voyageurs; their canoes and boats portaged around non-navigable stretches of streams, left an ineradicable impress of navigablity upon the streams and lakes which they used, streams with no greater depth than the area involved herein and other bodies of water with far less expanse of water surface. The evidence shows unequivocally that the fur bearing trade on the lakes involved, particularly Malheur Lake, was large and valuable, the industry did become important, and the waters of the lakes were used in their natural and ordinary condition according to the customary modes of trade and travel over water in such fur bearing trade. Even the testimony of John Gardner (noted by the Special Master on page 20 of his Report), Abs. p. 715 l. 5-25, p. 965, l. 39, p. 353 l. 18-21, gives the lie to his legal conclusion that the fur industry did not become important. We respectfully contend that the evidence referred to and the witnesses cited under our *Exception* 14, show that the Exception is well taken and the Master's conclusion erroneous. We have for the con-

venience of the court, made an accurate and succinct statement of the evidence relating to *trapping* and the *fur bearing trade*, which we have set forth in the *Supplement to this brief, Appendix A*. We confidently assert that it overwhelmingly establishes the early and long continued use of the area involved for commerce and travel in the fur bearing trade and that it is sufficient to establish navigability in fact of the waters involved.

(ii) Boating and Navigation. (Defendant's *Exceptions* 15, 16, 17, 31, 32, 33, 36).

The Special Master in his Report states his opinion that (a) the boating which took place in the area involved had no commercial aspects and is no indication of navigability; that (b) the elevation of 4093, the mean elevation of the Neal meander line, was the line of ordinary high water on February 14, 1859, when Oregon was admitted into the Union; that (c) the water surface elevation has never been consistent; that (d) it it difficult to entertain the idea that a lake made up of 47,670.4 acres with the depths shown on page 22 of his Report when the water elevation was 4093 is navigable. The subject matter of (b) supra, is fully dealt with under *Defendant's Exception* 48 that of (c) supra is more fully treated under *Defendant's Exception* 47; that of (d) supra is more fully treated under *Defendant's Exception* .

The subject matter of (a) supra, is dealt with under *Defendant's Exception* 15. The testimony of the witnesses listed under this Exception establish as stated therein that:

> *Malheur Lake* has been used for the purpose of commerce and navigation from the earliest date the white man settled in Harney County.

> Such use consisted in skating on the ice in winter, in rowing over the waters of the lake in boats and skiffs for pleasure and recreation, in hunting for wild water fowl, in trapping for fur bearing animals, in transporting in a few instances produce other than wild water fowl and fur bearing animals; that such boats were propelled respectively by oars, sails, outboard motors and marine engines; boats were used for transporting persons across the waters thereof for purposes other than hunting and trapping; that not only Malheur Lake but the entire area had great economic value.

The witnesses listed under this Exception establish as stated therein that:

> The waters of the *Narrows* have been used for navigating the same with row boats for pleasure, in hunting, for transporting persons across its waters, and transportation generally.

The witnesses listed under this Exception establish as stated therein that:

> The waters of *Mud Lake* have been used for the purpose of navigating the same for pleasure, in hunting and for transportation.

The witnesses listed under this Exception establish as stated in the Exception that:

> At various times persons went out on *Harney Lake* in row boats.

The State of Oregon asserts that these ultimate facts just recited are conclusively established by the testimony of the witnesses named, and the names of such witnesses with citations to the Record establishing the points made are given under *Exception* 15.

Under the law elsewhere quoted in this brief, both by this Court, the lower Federal courts and State courts, we submit that *these proven facts establish*

navigability in fact when Oregon was admitted into the Union, and that therefore the area involved belongs to the State of Oregon.

The witnesses above referred to and those noted under *Exceptions* 16, 17, 31, 32, 33 *and* 36, adequately dispose of the findings and rulings by the Special Master which is the subject matter of those Exceptions; however we deal more fully with the effect *irrigation* has had upon the area involved under our *Exception* 33.

(iii) Depth of the Water of the Lakes. (Defendant's *Exception* 18).

The instructions to J. H. Neal with reference to the manner of the survey are set forth in the record as Plaintiff's Exhibit 36 (Abs. p. 176). These instructions directed him to follow the requirements of the Manual of 1894 and extend the lines of the public survey then established from the Meldrum meander line to the then present shore line. (Abs. p. 176 l. 10-13, 33-35, p. 177 l. 6-12, 37-41).

He was also directed to establish all corners with stone wherever it could be procured. (Abs. p. 178 l. 1-8). The mean elevation of Neal's meander line as surveyed in 1931 and projected upon Plaintiff's Exhibit 3 is 4093 feet above mean sea level. (Abs p. 174, l. 16). The Special Master in his Report has assumed that any lands, however slight, which project above elevation 4093 within the lake do not constitute a part of the bed of the lake, and are still owned by the government as stable unsurveyed lands. Although Mr. Neal under his surveying instructions pressed his line in towards the center of the lake and into the water's edge as far as possible, it is entirely erroneous to assume that the water of the lake does

not reach an elevation above 4093; nor does such fact impair the validity of the Neal survey.

The government in the case at bar has been at particular pains to show that at a number of places in the lake the ordinary highwater of the lake flows past the Neal meander line and floods the patented or deeded uplands. The government is concluded by the surveys made so far as the lands actually described and paid for are concerned.

> Security Land & Exploration Co. vs. Burns, 193 U. S. 167, 187, 48 L. Ed. 662, 674; 24 Sup. Ct. Rep. 425, 431.
>
> Hardin vs. Jordan, supra. 140 U. S. at p. 377 (7).

In Hardin vs. Jordan, this court found it a circumstance of no importance that the waters of the lake rose during high water seasons and went past or outside the mander line. This court said:

> "(7) That at times of *high water*, however produced, the water in said lake or lakes *extends to and beyond the limits that it occupied at the time of said government survey.*" (140 U. S. 428, 35 L. Ed. 428, 432).

An analysis of the testimony of the government's witnesses introduced shows that it is fallacious to assume that the lake does not reach an elevation above 4093, or that it has never had an elevation considerably higher than that.

Exception 18, Sub. (a) Under Defendant's Exception numbered 18, *subdivision* lettered (a) we have assembled a list of witnesses who describe the appearance of Malheur Lake in earlier days before the present dry cycle commenced. This testimony shows that when these witnesses first saw the lake it looked like a vast body of water, with scattering

patches of tules in it, and when out upon the lake it looked like a vast lake when in the center of it. And when this lake was observed from an elevation it looked like a vast body of water. We call attention to the court of a description of this lake as seen from Saddle Butte mountain given in U. S. Geological Survey Bulletin No. 252, Geology and Water Resources, Central Oregon, cited on pages 38 and 39, Plaintiff's Exhibit 52, the Jessup Report, wherein the lake is referred to as being so broad that its farther shore cannot be discerned from the summit of that elevation.

The Special Master concludes that Malheur Lake with an area of 47,670.4 acres, and depths shown on page 22 of his Report, is not navigable, based upon the premises: that the mean elevation of the Neal meander line is 4093 (Abs. p. 174 l. 16, 24-25), and that the bottom of the lake is elevation 4088.8 (Abs. p. 263, l. 1-3), both of which facts we concede; and the assertion that the water supply except in years of abundant precipitation and favorable runoff, is not sufficient to maintain a mean or average water surface elevation much above 4093, which finding we challenge. We claim that this conclusion is not borne out by the water study of the government engineer Jessup, though it was designated for such a purpose, because the water records are extremely meager, and furthermore do not include the run offs from the low foot hills and smaller streams including Malheur or Nine Mile Slough. Further, the Special Master has completely overlooked the effect of the testimony of the large number of government witnesses, the citations to which we have assembled under Defendant's Exception 18, subdivisions let-

tered (a) to (s) inclusive.

We have classified the testimony of the witnesses under Exception 18, and ask that it be read and considered in connection with the contour survey maps, Plaintiff's Exhibits 3 (same as 3A) and 4 (same as 4A). These contours give by one foot elevations the elevations of all places through which they run with reference to mean sea level, and at a glance they show the relation of the contours with reference to the lowest elevation in the lakes; (Malheur lake being 4088.8 as above stated; the Narrows being slightly below 4089, Abs. p. 755, l. 12-13; Mud Lake being 4088, Abs. p. 802, l. 31; Harney Lake being 4079.7, Abs. p. 818, l. 20), and they also show the relation with reference to the Meander Line established by J. H. Neal in 1895-6 and the prior meander line of 1877 by J. W. Meldrum.

All but five of the witnesses whose testimony is before this court, were witnesses called by the United States, plaintiff herein, and if the plaintiff is not bound by the testimony of its own witnesses, a rule applicable in ordinary lawsuits, because the court may not apply the rules of evidence so strictly in controversies between sovereigns, at least there must be some very conclusive reason why the overwhelming proof these witnesses adduct should not be accepted, before this court is justified in disregarding the plaintiff's own evidence. When eye witnesses called by the plaintiff testify that they *saw the water* of Malheur Lake rise to such or such a point at certain times stated, or the waters of the Narrows, Mud Lake, at the Sand Reef Division or Harney Lake rise to certain places, which places they *specifically describe*, then we may confidently assume and assert that the

existence of the lake at such or such places has been conclusively established. If we turn to the Location of Principal Points described by the witnesses, which have been alphabetically arranged in the Joint Abstract of Record, pp. 1103-1166, inclusive, we can find a precise description of the particular place or point testified to, and by examining the Plaintiff's contour survey maps, Exhibits 3 and 4 (same as 3A and 4A), we can promptly locate the exact point or place testified to, and by inspecting the contour lines shown on such maps at such point or places, we can tell exactly the elevation of the waters of Malheur Lake or the other bodies of water at the times referred to by the witnesses, and knowing the elevations we instantly know how deep the water in the lake was at the time the witnesses saw it, and whether such testimony proves a greater depth of water than the Special Master has conceded in this case; also where the water stood with reference to the so-called islands and with reference to the Neal meander line with its mean elevation of 4093.

This is the task which we have completed and we give the court the ultimate facts the record discloses from the sources stated and our analysis of the testimony of the witnesses cited under our *Exception* 18, subdivisions (b) to (s), inclusive.

Exception 18, *sub.* (*b*). The witnesses listed under Exception 18, subdivision (b), give their observations of Malheur Lake, the Narrows and Mud Lake, describing places where the lake waters covered elevations varying from 4093 to 4108 feet above mean sea level. A condensed succinct statement of what these witnesses exactly saw is set forth in the *Supplement* to this brief, Appendix B.

When the water in Malheur Lake rose to elevation 4105, it would have a depth of 17 feet, as pleaded in the Amended Answer.

Subd. (*c*) The witnesses listed under this subdivision describe various places in the lake and adjacent to meander line where they have observed the water of Malheur Lake and Mud Lake and which show elevations ranging from 4093 to 4097. A succinct statement of what these witnesses describe is found in the *Supplement* to this Brief, Appendix "C".

Subd. (*d*) These witnesses describe the water of the lake at and near Saddle Butte, showing an elevation approximating, if not exceeding, 4097.

Subd. (*e*) These witnesses describe the water of Malheur Lake up to and near the old town of Lawen, elevation approximating 4097.

Subd. (*f*) These witnesses describe the water of the lake within a short distance of Windy Point and the old road, elevation 4105.

Subd. (*g*) These witnesses describe the water of the lake to a point within a quarter of a mile of Windy Point, elevation 4104.

Subd. (*h*) These witnesses describe the water of the lake within half a mile of Windy Point, elevation 4097.

Subd. (*i*) These witnesses describe the water of the lake within three-fourths of a mile of Windy Point, elevation 4095.

Subd. (*j*) These witnesses describe the water of the lake at the bank shown on contour map, Exhibit 3, a mile westerly of Windy Point, elevation 4094 at base of bank, water rises up and down the bank of several feet.

Subd. (*k*) These witnesses describe the water of the lake backing into Springer's Sodhouse Spring located in Lot 2, Sec. 23, T. 25 S., R. 31 E., South of the lake and immediately north of the Meldrum 1877 line. A water mark on a rock in the spring with an elevation 4094.6 is described by government witness Fry, who saw it frequently between 1885 and 1890. The government herein tried to minimize the force of the evidence as to the high water mark of the lake, but unsuccessfully. The testimony shows the facts as follows:

The elevation of ground in the Spring at the base of the rock with the water mark on it is 4093 even; the elevation of the top of the rock is 4095.7 feet; the elevation of the water mark on the rock is 4094.6 feet. (Pecore, p. 732, l. 28-34). The waters of the lake backed up into the spring. (Hanley, p. 728, l. 41; Ortego, p. 369, l. 19-23, p. 725 l. 4; Gardner, p. 354, l. 18-23). Water has been up pretty well on the rock. (Springer, p. 730, l. 16, 17-30). Water was not seen to cover rock (entirely). (Marshall, p. 729, l. 34-35; Catterson, p. 729, l. 38-45). Fry stated that in the early days the rock stuck up 8 or 10 inches *above the water mark in high water period.* He remembers seeing the mark between 1883 and 1890 he built a fence there in 1889 and he saw it on the Sunday preceding the day he testified in the case; it was still there in the same place. The mark was ordinary high water line of the lake for a good many years. (Fry, p. 726-728).

After Fry testified as a government witness, its engineers went down and took elevations. These elevations as stated gave a normal lake height at 4094.6 according to the water mark. Then the government

tried to show some other reason for the water mark. So Springer testified that he did not see the lake back up into the spring. In this he is contradicted by Hanley, Ortego and Gardner, who all worked around Malheur Lake before Springer came into the country in 1888. The elevation of the ground in the spring being 4093 (the mean elevation of the Meal line) and the evidence conclusively proving that the water innumerable times rose higher than the Meal line, this evidence and the contours on Exhibit A and A-3 conclusively prove that Mr. Springer is mistaken. Springer said the Spring was caused to rise by the flood waters of the Blitzen. Furthermore William Hanley, author of "Peelin' Pine," whom the Master refers to as "a well known figure in that country." (Special Master's Report, p. 22-23) disagrees with Mr. Springer, and said:

> "The water in the Sodhouse Spring would not change much until pretty well along in the season. The flood waters did not really affect it." (Abs. p 7.29, l. 1-3).

The government then tried to prove by George Marshall that a dam in the channel of the spring branch one-half mile below the rock may have caused the water to rise on the rock. (Marshall, Geo., p. 729, l. 9-16). He came to the lake in 1888, p. 47.

His brother John Marshall said the dam in the spring branch (the stream which runs from the Sodhouse Spring to the Blitzen river) would not raise the water back to the rock, which dam was one-half mile from the rock. (Abs. p. 731, l. 32-39). He came to Harney county in 1884 when he was 7 years old.

George Benson, game warden of the reserve, tes-

tified since he came into the country in 1909 (Abs. p. 13) a dam was built in the Blitzen a little south of Benson's place (Abs. p. 1109). It was built to flood the Kado lands (Abs. p. 1137); that it raised the water in the Sodhouse Spring 2 feet. (Benson, p. 732, l. 7-8, 19-22).

With reference to this testimony we do assert a dam in the Blitzen river over a mile from the Sodhouse Spring could not back up the water in the Spring, for Plaintiff's Exhibit 3 and 3-A shows that the elevation of the banks of the Blitzen River is 4093 and obviously a dam higher than the river banks would merely cause the water to overflow the banks, and not cause the Blitzen and Spring branch to back up. The elevation of the ground at the base of the rock is 4093. Furthermore a dam built *since* 1909 did not cause the water mark of elevation 4094.6 on the rock in the Spring, which water mark is described by government witness George Fry, who observed this mark in November, 1931, as being in the same place he saw it in the years 1885-1890.

We have in this high water mark on the rock highly corroborative evidence of the other testimony as to where the water of the lake came in the spring seasons. It flooded not only the so-called islands in the lake but it backed upon the deeded lands about the lake causing hay crop to grow thereon. This elevation shown by the water mark eliminates any real contention as to the existence of islands inside of Malheur Lake. As appears from the Report of the Special Master, Vol. 2, page 77, Appendix 14, Column E, there are only 1396.75 acres of land of the total area of 47,670.40 acres which are above water when Malheur Lake stands at elevation 4094. At 4094.6

a large portion of that 1396.75 acres is under water. Of this entire area of 1396.75 acres, 671 acres are in Pelican, Cole and Graves islands, so-called. (Id. p. 80).

Subd. (*l*) The testimony under this subdivision relates to *engineering data*, a succint statement of which is given in the *Supplement to this Brief, Exhibit "D"* and *Exhibit "E"*.

Subd. (*m*) These witnesses describe water conditions at The Narrows. Horses and cattle swam across, and in order to get from one side of the lake to the other, were usually taken around by the Sand Reef. The water is described as from 10 to 12 feet deep, or elevation 4099 to 4101; Sizemore, District Attorney, saw it when it was from 15 to 20 feet deep, or elevation from 4104 to 4109.

Subd. (*n*) These witnesses describe water at Narrows *bridge*, the contours of which are given on Plaintiff's Exhibit 3, showing elevations of water from 4096.3 at East end and 4094.6 at the West end. Water at different elevations described.

Subd. (*o*) These witnesses describe water on *sides of and over grade* of old Narrows *road*, elevation from 4093 to 4094; top of grade elevation not shown on Exhibit 3, but several feet higher.

Subd. (*p*) These witnesses describe water at Narrows *hotel* and southerly, elevation 4100.

Subd. (*q*) These witnesses describe water at *Haines store* at Narrows, elevation 4100.

Subd. (*r*) These witnesses describe water near *dance hall* at Narrows, elevation 4097.

Subd. (*s*) These witnesses describe Malheur slough which enters lake in Lots 10 and 12 of Sec. 19, T. 25 S., R. 33 E., W. M., North of Malheur Lake showing

back water of lake therein deep enough to swim a horse; some witnesses describe it from 3 to 6 feet deep. Hanley stated the slough was very much of a barometer as to the height of the lake and an important factor of the lake water supply. Elevation of slough banks is 4095 and of the bed between 4092 and 4093, therefore showing an elevation of the lake from 4096 plus to 4099.

The testimony of the witnesses above recited show that the water inflow into Malheur Lake until comparatively recently gave it a water elevation in the ordinary spring seasons considerably above 4093.

There are further circumstances which shed much light on the elevation of the lake. The chief objection to the Meldrum survey was when he entered the overflow area of the Silvies and Blitzen rivers; one of the witnesses testified that he waded in water up to his waist near the mouth of the Blitzen, (Abs. p. 140, l. 10-24; D. H. Smyth of Cawlfield vs. Smyth, 69 Or. 41). But no one has questioned the accuracy of his line at the easterly end of the lake in the Windy Point area. Several witnesses testify to seeing the water whip south of Windy Point and go into the space across the road south of the Point. (Abs. p. 368, l. 7, 44; p. 464, l. 44; p. 465, l. 1-4). The Meldrum line shows a bay in section 14, Tp. 26 S., Rg. 33 E. There can be no question but what the lake extended to that point when he made his survey. There was no tule belt in that area to make surveying difficult. The elevation of the Meldrum line at that place is above 4097. This official government survey is highly corroborative evidence where the lake came to, and it is in agreement with many witnesses.

Accordingly we contend that we have established a water surface elevation substantially as pleaded in the Amended Answer, p. 45.

The evidence which we hereafter cite with reference to the Sand Reef, which broke through in 1881 is highly illuminating. It is given under *Exception* 25, infra.

(iv) *Shallow and Deeper Areas in Lakes. Exception* 19. The State of Oregon takes issue with the Special Master that because the lands classified according to depth are not in compact areas, (Plaintiff's Exhibits 3A and 4A) this strengthens the conclusion that the waters were not navigable. This is a *non sequitur* as will be readily apparent when the court reads the cases cited in this brief. This very situation existed in the case of Mud Lake in the Holt State Bank case and many of the lakes discussed in the state cases hereinafter cited, and yet the courts held the lakes to be navigable.

(v) Transportation of Commodities. *Exceptions* 14, 15, 20, 32 *and* 33. The subject matter of these Exceptions is analyzed in the testimony cited under *Exceptions* 14 *and* 15, and establish that findings should be entered herein in accordance with the position urged by the State of Oregon showing that there has been trade and travel and transportation of fur bearing animals, game birds, persons and commodities and bringing the area within this court's definition of navigability.

(vi) Recitals of non-navigability in the cases cited by the Special Master in his Report pp. 23 and 24. *Exceptions* 21 *and* 22. As shown by the references given in *Exception* 21, the parties in private litigation assumed, conceded and *stated in briefs* filed

by them that the lakes were non-navigable. Such fact has no evidentiary value herein. The rule applied by this court to the United States in similar cases is applicable herein. The State of Oregon was not a party and is not bound. In Oklahoma vs. Texas 258 U. S. 591 this court said:

> "It was purely private litigation. The United States was not a party and is not bound."
> See also Economy Light & Power Co. vs. United States, 256 U. S. 113, 123.

Of similar effect is Gillihan vs. Cieloha, 74 Or. 462, 467, 145 Pac. 1061, 1062 (1), where the supreme court of Oregon refused to fritter away the rights of the State on concessions by private parties in private lawsuits. That the rights of the United States and the State of Oregon cannot be affected by litigation in which they are not parties should seem to be so elementary that argument is unnecessary. The Special Master erred in giving any evidentiary value to such cases.

(vii) Reports of army officers and maps introduced, Plaintiff's Exhibits 23-32, old maps. *Exceptions* 23 *and* 25. These reports and diaries are exceedingly ambiguous to say the least; there was no way to cross examine the witnesses and the reports are full of errors. The maps if anything prove the existence of three large lakes. The earlier drawings (they cannot be called maps in any true sense) justify the criticism of Judge Colvig on the trial:

> "It seems to be correct that I am not the only map maker on these military expeditions that could make errors in drawing diagrams of the early lakes." (Abs. p. 1062, l. 24-25. See also l. 3-10).

Fremont's maps showing the Malheur river flowing

out of Malheur Lake through Malheur Gap, if of any probative value, shows an elevation in the lakes of over 4106. It seems quite apparent from a study of the records as to the courses and distances traversed by some of the expeditions that what was termed *Sylvailes river* was probably *Silver Creek* which flowed into the northwest corner of Harney Lake, and that the name later was transferred to the river which became the Sylvies. See Abs. p. 1018, l. 5-8, 25-27; p. 1025, l. 35-45; p. 1026, l. 21-23; p. 1027, l. 5-7, 17, 47-48; p. 1028, l. 30-46; p. 1032, l. 24-49 and p. 1033, l. 1-15; p. 1041, l. 3-26, 35-39. The traveling W. N. W. 20 miles would bring the parties to Silver Creek, and the testimony shows that they named Harney Lake Sylvailes Lake, before it was given its later name after General Harney. (Abs. p. 950, l. 40-47; p. 952, l. 8-16). In Capt. Wallen's report to General Harney dated Nov. 25, 1859, he describes Harney Lake on July 7, 1859, as:

"A large salt lake, twenty miles long and nine broad," and he finds a sand reef at its eastern end. An inspection of Plaintiff's Exhibit 4 will give the court some conception of what the depth of Harney Lake must have been if it was twenty miles long. Captain Wallen's topographical engineer, Lieut. Dixon, described Harney Lake at the same time as:

> "Over a length of about 18 miles and in breadth about 10 miles. It had every appearance of being very deep, and the water was so salty that our animals would not drink it." Abs. p. 1020.

We ask the court to note that R. C. Clark's conclusion that a channel ran from Stampede Lake into Harney Lake and that Stampede Lake is the same as Mud Lake, must be erroneous as Stampede Lake

is described as being a mile or two to the *northeast* of Harney Lake. Abs. p. 1020, l. 10-14.

The next year Dixon again accompained a military expedition in the vicinity of Harney Lake. In the latter part of June or first of July he describes Stampede Lake as a slough making out from Cricket River which flows into Lake Harney near by. Dr. Clark interprets Cricket River to be the Silvies. If so we do not know how "From Cricket River we traveled over a low, sandy ridge that extends down from the high table lands south of Lake Harney into the Valley of New River." (Abs. p. 1021, l. 10.) It is apparent that the Cricket river must have been in the vicinity of Stampede Slough in order to directly cross high table lands south of Lake Harney. As a matter of fact Dixon did not get anywhere near Malheur lake. His descriptions and maps prove it. In the next place if Stampede was flowing into Lake Harney it was because both were up, for there is no evidence that the water ever got low enough to cut a gap between them, or make a channel in the level soil above Harney Lake. The evidence shows that the present gap in the sand reef did not get low enough for several years, to begin to cut a channel in the ground between it and Mud Lake. In the next place in view of the vast quanitity of fur bearing animals taken from Malheur Lake, it is clear that none of the old trappers or their successors realized the fur bearing wealth that was concealed in the western part of the lake or around its shores in the tules. (Abs. p. 714-724.)

Edward H. Geary, Indian agent describes Harney Lake in June, 1860 as 17 miles long and 12 miles wide. Again a lake practically twice the size of the present meandered lake. He describes Willow (Willard

Creek) flowing through a succession of tule marshes from the north. When we remember that the Red S Fields, the Island Ranch and the whole area from the lake to Lawen and from Lawen to the present site of Burns in the old days was one vast marsh, it is not to be wondered at that these individuals, did not go into the forbidden area and delighted to travel the hard sandy beach of Harney Lake. (Abs. p .1021.)

Exhibit 25, 1859, does show three lakes, though the extent of Malheur was not known. Its inaccuracy is shown by the fact that it shows two big streams flowing through the marshes to the north and to the west of it, and there are two big streams flowing into it from the south, with the head waters of each in the Steens mountains.

The Dixon map showing the route between The Dalles and the Great Salt Lake is, palpably incorrect, and shows that Dixon never got away from the north side of Harney Lake.

It is clear that Exhibit 26, the 1841 map, shows three lakes, it is erroneous in that it has Malheur River flowing through the gap from the lake; or are we to construe this map to prove that the waters in the lakes were high enough at that time to flow through the gap into Malheur, thence into the Snake, thence into the Columbia and the Pacific! As to the government's counsel in this case, we hear them saying: "Perish the thought!" it would smack too much of interstate streams.

Exhibit 27, map of 1856, shows three lakes; the two right hand ones separated from Harney Lake. A river flows through the gap out of Malheur Lake, thence into the Snake River. The right hand lakes are indicated on the map as follows: "Malheur L." When we

remember that the testimony of witnesses in the case at bar was to the effect that Mud Lake was not known until long after the settlers came into the country, but that everything east of the sand reef was Malheur Lake, this map of 1856 is very significant. It absolutely refutes Dr. Clark's conclusions given on page 1021 of the Abstract of Record, lines 41-49. Somebody, had made some written reports which were accurate as to the lakes, for maps were drafted and published as early as 1856, showing and naming thereon, the lake known as Malheur Lake. The map was made before the militarists assumed use of the names of their commanders, General Harney and Major E. Steen, for Syvailles Lake and the Snow Mountains; in this map of 1865, Harney lake is named from the old trapper, as L. Sylvaille.

The rest of the maps, Exhibits 28 to 32, are more or less illuminating as to the period between the date Oregon was admitted to the Union and until the sand reef was cut through. The attempt of the government in this case to torture the so-called historical evidence and maps into proof "that as of the date of statehood a substantial part of Lake Malheur Reservation within the Neal Meander line was not lake but land," is abortive.

It is apparent that in this case the government has found only a portion of the old documents. A book by Travers Twiss, published in 1846, contains a map showing the river flowing into chain of three lakes, just named "Sylvailles." (Abs. p. 1027, l. 26). In a book entitled "Mitchell's New Map, of Texas, Oregon and California," published in 1846, three maps are shown. (Id. p. 36). John C. Fremont, shows Malheur River flowing out of three lakes, all un-

named. It was published in 1849. (Id. p. 47).

It is very clear that the few army records offered are of men who never saw, much less accurately described eastern Oregon in the region of "valley of the lakes." (Abs. p. 1037, l. 8).

Dr. Clark drew the conclusion that up to 1864 there was only one big lake and that there must have been a lot of rainfall to create the condition found in 1864. (Abs. p. 1025, l. 3-14). The evidence introduced in the case at bar refutes such deductions. Even the tree ring study Exhibit 52, Figure 9, shows the lake normal in 1859 and at the same line as in 1922 when the water stood at the Neal line. At the time Clark testifield, and offered his report, he had not seen the map of 1856, Exhibit 27. This was developed on cross examination. Here we have this early map of 1856 showing three lakes, with a large stream flowing into Malheur Lake. (Abs. p. 1028, l. 30.) See Special Master's Report, Volume 2 pp. 89-94.

George B. Currey report. On June 23, 1864, scouts from Steen's mountains reported *"a large lake"* some distance to the northwest. This was "very correctly concluded to be Malheur River Lake." They then turned their direction to the lake. "We reached the *southeast* margin of Lake Malheur on the evening of the 24th." (Abs. p. 1032). He said the water was brackish "the *banks* are low, covered with greasewood, with a very scanty supply of alkali grass." He said the water of the lake was shallow. This we would expect from the surveying data introduced in the case at bar. They then passed around to the south side, came to sluggish deep creek, which was undoubtedly the Blitzen river, then went up the river and crossed at what was probably Rock Ford, and then the west

fork, later known as McLaughlin Slough, dubbed the rivers Donner and Blitzen, due to a thunder storm; they reached the east end of Harney Lake on the afternoon of the 27th of June, 1864, found a deep quicksand bottom connecting the waters of Harney Lake and Stampede Lake on the east, and which was an "arm of Malheur Lake" in the early part of the summer, and they were forced to go around Harney lake to the west. (Abs p. 1033).

There can be no question from this report as to the existence of three lakes, and Malheur Lake is described as a "large lake."

He later started up Selvie's River which he describes as a tributary of Stampede Lake; he then crosses this river, and forms a junction with Captain Drake at Rattlesnake camp on a small creek in the mountain rim which encircles "the Harney and Malheur Lake Valley." (Abs. p. 1032-3).

See also Abs. p. 1022, 1023; Abs. p. 937-938; Abs. p. 951, 952. From the analysis of the testimony of the eye witnesses listed under *Exception* 25, infra, it is apparent that if Stampede Slough can be identified with Mud Lake or the Sand Reef Division to the east which we deny, that then the channel through the sand reef was only low enough to form a current through comparatively high bodies of water.

As to the Harritt Diary and the McClure Diary, Abs. p. 1046 and 1047 if they throw any light on the region of the lakes we fail to preceive it. The hardy but lost pioneers referred to in the McClure Diary, wind up their observations as to *some lakes somewhere* and finally see the Three Sisters and Diamond Peak, four well known mountains in Oregon "N. 45 degrees W" (Abs. p. 1059, l. 21) from where they

are. We, too become lost, for these mountains are N. 45 degrees W of the lakes in Lake county, not of those involved in the case at bar; they found themselves also not at a tule lake but at a swamp which forms the east branch of the Deschutes. (Abs. p. 1056, l. 4-10). If these diaries and documents give any accurate picture of the lakes involved in this case when Oregon was admitted into the Union we leave it to the plaintiff's astute counsel to expound.

(viii) Have the lakes always been shallow lakes, not exceeding elevation 4093 largely. *Exceptions* 24, 25, 26, 27, 28 *and* 30. The Special Master in those portions of his Report, which is the subject of the foregoing Exceptions by the State of Oregon, finds the lakes always have been shallow, variable in area and depth, never greater than the depths indicated when the waters stood at the elevation of the Neal meander line boundary line of 4093, never had a depth up to 4105 or 17 *feet*, and says that mean or ordinary high water has not *during many years* past reached the said meander line boundary.

Exception 24. The witnesses listed under this Exception conclusively prove that the waters in the early days were a great deal higher than in recent years, there was more snow and rain, enormous amounts of water came down and flooded the country, covering the tops of the tules which other witnesses describe as high as a man's head on horseback, and that the water never got as high again as it was before the Sand Reef broke through.

The position taken by the Special Master and the subject of Exceptions 26, 27, 28 and 30 has been analyzed and we believe rendered untenable, under

the evidence referred to and listed under *Exception* 18, supra.

Exceptions 25 *and* 29 deal with the elevation of the water at the Sand Reef, before it broke through, and fortify the conclusion of the State of Oregon, and we proceed to analyze the testimony listed under Exception 25.

Exception 25 Sand Reef Testimony. *Subd.* (*a*). The witnesses listed testify that before the gap was formed in the Sand Reef by the cutting or breaking thereof by high water in the spring of 1881, greasewood and sagebrush grew at the place where the gap was subseqently created, and the appearance of the reef showed no indication of its ever having been cut through before, contrary to the conclusion of Dr. R. C. Clark from the so-called historical documents. As William Hanley stated:

> "It was a different country there altogther when the Sand Reef was in there." Abs. p. 832, l. 10-11.

And he expresses the opinion of other eye witnesses who were well acquainted with the reef before it broke through:

> "I saw no evidence of the Sand Reef ever having been cut through before at any time that would interest man." Abs. p. 832, l. 30-32.

Subd. (*b*). These witnesses describe the reef as from 8 to 10 feet high, at the place where it cut through in 1881.

Subd. (*c*) These witnesses describe the reef as from 10 to 12 feet high.

Subd. (*d*) Parker states his opinion that it was from 12 to 15 feet high.

Subd. (*e*) J. H. Neal when he made his survey

in 1895-6, stated in his field notes that the reef was 10 feet high at that time.

Subd. (*f*) The height in 1931 is shown on Plaintiff's Exhibit 4. Pecore stated it rose from 4090 to 4156. Abs. p. 822, l. 37-43. He is apparently describing its whole course. The base of the Reef on the west side as shown on Exhibit 4 is about 4094.

Subd. (*g*) Ortego and Brenton stated it was higher in 1931 than in 1881 and prior years.

Subd. (*h*) These witnesses claim it was no higher in 1931 than in early days. Dr. L. E. Hibbard, the naturalist, is one of these witnesses. He is one of the leading witnesses called by the government herein, and a trained observer.

Subd. (*i*) These witnesses stated the water broke through the reef at a place somewhat lower than balance of reef. They give various estimates as from 3 to 6 feet lower; these estimates should be compared with their estimates of the height of the reef given by them as listed under Subdivisions (b), (c) and (d), supra. Thus Parker who gave the depression in the reef as about 6 feet, testified that the reef was from 12 to 15 feet high.

When we examine Exhibit 4 the contour map (same as 4A), it is apparent that the elevation of the base of the sand reef is 4094; hence the water as it stood on the reef, if it was from 8 to 15 feet high, must have been at an elevation of at least 4099 and possibly 4103. If the height of the reef at the gap in 1881 was commensurate with its height in 1931 as some witnesses testified then the water was over 17 feet deep in Malheur as pleaded in the Amended Answer. Engineer Dodge had L. M. Caldwell go with him the Sand Reef in 1931 and show him about

where he thought the water stood as Caldwell saw it in 1881. Dodge took the levels and it was 4107. (Abs. p. 917, l. 17-20.)

Subd. (*j*) These witnesses state there was a lot of water in the lake before the Sand Reef broke through, it was never as high again, and the only way to get cattle from one side of the lakes to the other before the Sand Reef broke through was to take them to the Reef and cross on it.

Subd. (*k*) The Sand Reef broke through in the spring of 1881. Parker states on May 2, 1881.

Subd. (*l*) This lists the witnesses who saw the Sand Reef immediately before, at the time or immediately after it broke through. M. H. Brenton, whom the government subpoenaed and had present at the trial, but whom they refused to call, evidently fearing to be bound by his testimony, was called by the State and testified he started the water going over with his foot. In this connection we call the court's attention to The Pacific Live Stock Co. vs. Armack, 30 L. D. 521, mentioned on page 48 of the Amended Answer.

Subd. (*m*) These witnesses describe generally the water conditions at the Sand Reef before it broke through. Show a large body of water easterly of it, up several feet on the reef and going higher until it cut through in 1881.

Subd. (*n*) These witnesses show that Harney lake was low on its side of the Reef, the distances estimated being from 100 yards to a half a mile. After the reef was cut the waters to the east and west of the reef levelled up, and some witnesses testify to the water flowing one way part of the day and the other way during another part of the day.

Subd. (*o*) These witnesses establish that great quantities of water flowed from Malheur Lake, the Narrows, Mud Lake and the area covered by the Sand Reef Division into Harney lake. The Special Masters Finding XXIV, excepted to by *Exception* 25, is rendered untenable in the light of this uncontradicted evidence.

Subd. (*p*) These witnesses show that in later years as some sediment or sand was deposited in the channel in the gap thereby raising the water level of the lakes to the east of the Reef, a number of the witnesses tried to remove the sand in the cut with scrapers, in order to lower the water level in the lakes and to enable them to raise hay on the higher portions of the bed in the western part of Malheur Lake. This is cogent proof of the conditions before the reef was cut through.

Subd. (*q*) These witnesses observed quicksand in the cut formed. This was offered by the government as some corroborative evidence of the quick sand conditions referred to in the so-called historical documents. But if the reef is the same, it does not establish that the cut was ever reduced to the elevation it got of 4083-4 in the years subsequent to 1881.

Subd. (*r*) These witnesses describe wind conditions on Harney lake and the Sand Reef; but as Hibbard observed, what is built up to-day is lowered tomorrow. We submit that this is the common experience in the sand dunes along the Pacific Ocean at least.

Subd. (*s*) This evidence refers to the effect of the channel cut into the bed of the Sand Reef division easterly of the Sand Reef and shown by the contour lines on Plaintiff's Exhibit 4 (and 4A).

A most conclusive proof of the fact that the cutting or breaking of the sand reef must inevitably have resulted in lowering the waters of the Sand Reef Division, Mud Lake, The Narrows and Malheur Lake, is evidenced by the fact that a channel was cut in the bed of the lake in the Sand Reef Division from the gap easterly to a depth of several feet. The elevation of the area easterly of the Sand Reef Gap is between 4092-3, and the channel in this area was cut down because of the cutting of the sand reef to a depth of a minimum of 4083 (Abs. p. 823, l. 5), and as it goes eastward varies from 4084 to 4087 (Abs. p. 823, l. 4-14). This channel is clearly shown by the contour lines on Plaintiff's Exhibit 4, leading easterly from the gap.

This cut channel did not exist prior to the breaking of the sand reef and was clearly caused by the flowing of water into Harney Lake through the gap and the consequent lowering of the waters easterly of the reef. Dunn, p. 837, l. 36-45; p. 837, l. 1-3; 15-20, 26-31. Bardwell, p. 839, l. 30-35. Hibbard, p. 530, l. 5. Ortego, p. 530, l. 14-25.

From the foregoing testimony it is apparent that the Special Master's proposed Finding XXIV, set forth on page 123 of his Report, is untenable and the State's *Exception* 25 thereto should be sustained, and a finding made as requested by the State. Likewise the Special Master's proposed Finding XXX, set forth on page 129 of his Report is likewise untenable, and the State's *Exception* 29 thereto should be sustained and a finding made as requested.

(ix) Irrigation and Effect of. (*Defendant's Exceptions* 31, 33) The Special Master has refused to concede that the irrigation of the large areas of

sage brush lands in the valleys of the Silvies and the Blitzen has had any material effect in lowering the water level of the lakes since Oregon was admitted into the Union.

The testimony of the witnesses which render this position of the Special Master untenable is assembled under *Exception* 33. That there has been a lot of irrigation is indisputable. Even the government's star witness, L. T. Jessup, concedes:

> "In all probability, the average amount of water reaching the lake over a long period of years has not been decreased by more than *forty or fifty thousand acre feet per year.*"

Plaintiff's Exhibit 52, p. 76. See Cooper and Dodge, Abs. p. 1089-1090. The diversion of 40,000 to 50,000 acre feet of water per year would in itself lower the water level of Malheur lake (which has an area of 47,670.40 acres) substantially *one foot.*

It seems to us that the facts in this record conclusively show, certainly a preponderance of the evidence shows, that there has been a very important change in recent years in the amount of water reaching Malheur Lake. The evidence shows the Silvies River has been dry year after year and discharges nothing at all into the lake. The conclusion that the use of vast quantities of water for irrigation on dry lands during the summer months does not reduce the flow of water into the lake seems to us contrary, not only to the evidence, but to normal experience and sound judgment. The conclusion seems to us to be unsound and unscientific and opposed to the entire deductions to be drawn from human experience and ordinary observation from the development of a new country.

(x) Area habitat of game birds. *Exception* 34. The Special Master in his proposed Finding XXXIV (Report pp. 130-131) finds that "vast numbers (of game birds) in *earlier times* found their habitat there" that is the area involved herein. The allegations of the Complaint and Amended Answers and which are amply sustained by the testimony of the witnesses listed under our Exception 34, and Exception 15, subdivisions (3) and (10), show that the area has great economic value because of the large number of wild water fowl and is one of the most important places west of the Rocky Mountains for the feeding and resting of migratory wild water fowl and for the breeding thereof. The State of Oregon recognizes its value, but it is not necessary that the United States be given these lands in order to ensure the continued use of the area for the purposes for which it is adapted. The area is large enough to promote a bird refuge and also subserve the stockraising needs of the community.

(xi) Government transportation of persons and navigation. (*Exception* 37). Has the area involved been patrolled by the government with row boats and gasoline launches, and have their wardens conducted numbers of the public thereover in launches for the purpose of sightseeing and pleasure as pleaded in the Amended Answer, pp. 25-26. The Special Master made a Finding XXXVI (Report p. 131), holding directly against the State on this issue, and this Finding is the subject of our *Exception* 37, and we have submitted what we believe is the correct Finding.

The proposed finding of the Special Master is untenable. See testimony of Dr. L. E. Hibbard, natural-

ist and one of the Government's chief witnesses herein, Abs. p. 952-955, 956. See also witnesses listed under Exception 15, subdivision (10).

Benson describes how he took a party of government and state men including among them Dr. L. E. Hibbard, and Stanley Jewett, and the writer of this brief in 1922 in a gasoline boat, and testifies how he patrolled this area generally. He testified further:

> "As supervisor for the Government, I have taken quite a few people out in boats; they have gone for the purpose of seeing the birds." Abs. p. 1001, l. 1-2.

(xii) *Navigability in fact of all Divisions.* Requested Findings of State of Oregon, referred to by the Special Master in his proposed Finding XXVIII (Report 127-128) as to each and all of the Divisions of the area involved should have been adopted. If we are correct in our position that the evidence above referred to under our Exceptions 2-41, inclusive, establish navigability in fact when Oregon was admitted into the Union, then the State's requested Findings as specified in our *Exceptions* 38, 39 40 *and* 41 should have been given.

(3) Were there Stable Lands Constituting Islands and/or Promontories Within the Area Involved on February 14, 1859?

(Report of the Special Master, p. 25)

Exceptions 42-49

The Special Master found that all lands above

elevation 4093, the mean elevation of the Neal Meander line above sea level, were stable lands when Oregon was admitted into the Union and ever since have been and still are owned by the United States; such lands are shown as *uncolored* on the contour maps, Plaintiff's Exhibits 3A and 4A. He stated that such lands are not in compact bodies, but consist of scattered islands and or promontories aggregating 7,9991.6 acres above 4093, of which 840 acres is in Pelican Island and 350 acres is in Cole Island. He further found that said elevation 4093 was the mean elevation of the water surface of the lakes when Oregon was admitted.

The State of Oregon challenges the accuracy of this opinion and of these findings of the Special Master, and in the Exceptions filed herein states what it contends he should have found.

The evidence shows even as late as 1922 and 1928, the waters of Malheur Lake came to the Neal meander line. It came there regularly and consistently prior to the recent dry cycle. It not only came to the Neal line, but as we have seen from the evidence to which we have called the attention of the court in our discussion of *Exceptions* 18 *and* 25, supra, in earlier days even after the break in the Sand Reef in 1881, the waters of the lake stood at elevations which brought the lake within a few hundred feet of Windy Point, around Saddle Butte, around the hotel, store and old dance hall at the Narrows, and to heights ranging from elevations 4097 to 4105. The old water mark on the rock in Springers Sodhouse Spring which was first carefully observed in the period from 1885-1890 (Abs. p. 726, l. 39-40), was in the same place in 1931, when its elevation was taken,

shows a water elevation of 4094.6. A summary of the elevations of water surface testified to is given in the *Supplement* to this Brief, Appendices B, C. The engineering data on elevations is summarized in Appendices D, E.

The elevations testified to completely negative any conclusion that any areas within the Meander Line Boundary *above* 4093 *are stable, fast lands, or constitute true islands or promontories.* As Kilburn stated: "A *dry place* wouldn't be more than 6 inches above water." (Abs. p. 318, l. 9) If a check is made of the testimony of the witnesses who testified to seeing knolls above water, it will invariably be found that they were testifying to conditions as they observed them in the fall or winter months, when the water surface naturally was at its lowest. A true picture is given by George E. Whiting who testifield to a trip with a man named Adams in a boat:

> "It was a kind of tule, visiting neighbors out on those islands, and I thought, what could a man do sticking around, just where he had building room on those places just like a rat." (Abs. p. 334, 11-13).

He also said:

> "It all looked like a watery grave to me at that time." (Abs. p. 371. l. 43.)

The area was well described by Dr. L. E. Hibbard, a scientist and one of the government's chief witnesses, in answer to a question by government's counsel as to the islands in the westerly part of the lake:

> "Not very many that I would consider *real islands.* There are a great many places where a *little soil will stick out,* and there are a *few real islands* which show that they have not often,

if ever, been covered, like the one that extends out from *Johnny Graves*. There is a high ridge, and half the time it has been an island, and half the time a peninsula, and it shows that rarely, if ever, it has been covered with water. And then there are hundreds that sometimes a little ground projects from, and sometimes they look liks islands and vast numbers of them, hundreds of them, if you go to make a landing on them, you will find there is water underneath. There is a floating lot of vegetation and tule, and it will hold the birds up, but if you step on it you will sink in to this depth. It would be from a foot to two feet deep under this tule bed that the birds nested on." (Abs. p. 326, l. 35-46).

He came to the county rather late, in 1899. See also the description of Finley (Abs. p. 671, l. 34-46). He was reservation warden for years.

U. S. Geological Survey Bulletin No. 252, Geology and Water Resources, Central Oregon, refers to the open water of Malheur lake being bordered by rank growths of dark green rushes, "which also form many *island like areas* here and there on the surface." Exhibit 52, p. 39.

The references to the testimony given under *Exception* 42 negative the idea of any true islands in the lake.

An almost conclusive array of testimony is presented by the witnesses who testify that from the beginning after the waters commenced to go down sufficiently to permit them to go into the area involved, that the waters in the spring seasons of high water invariably rose high enough to cover the so-called islands with the standing water of the lake, which rose with freshets in the Silvies and Blitzen and other tributaries flowing into the lake as well

as the run off from the lower foothills; that the water, except in the dry seasons of 1888, 1889, 1919, 1930, 1931, 1932, was invariably high enough to produce a crop of wild hay, and that the nature of the vegetation was such that it had to have *standing or moving water* of the lake over it. The evidence establishing this is summarized by the witnesses referred to under *Exception* 47.

A general description of these so-called islands is that there is salt grass on the top of the higher ones, then as the elevation decreases there is in turn wire grass, then swamp grasses and then tules, vegetation requiring standing or moving water. The evidence conclusively establishes that salt grass is that which (except scattering growths) grows at the water's edge, lapped or covered with lake water in the spring and above the water's edge in the fall and winter. That it in fact is a *vegetation peculiarly indicative* of where the water rises and recedes during the seasons. The testimony establishing this is collected under *Exception* 60, *subd. b.*

With this in mind we call the court's attention to *Pelican Island* and *Cole Island* and *Graves Ridge or Island.*

Pelican Island That even Pelican Island, the highest in the group grew vegetation which required lake waters to enable it so to do is evident from the testimony of the witnesses referred to under *Exception* 45, *subdivision* (*a*). Furthermore in 1908, W. L. Finley, naturalist who was the person chiefly responsible for causing President Roosevelt to issue the Reservation proclamation, government witness therein said:

"In 1908, when I was at Malheur Lake mak-

ing a survey, we camped on Pelican Island; the *top of the island was all a matted growth of these tules.*" (Abs. p. 283, l. 9-11).

The evidence conclusively proves that tules have to have water over their roots at least the year round or they dry up. (Exhibit 52, p. 40, l. 12-17), (Abs. p. 509, l. 39, 46; p. 574, l. 31; p. 638, l. 15; p. 648, l. 1-5).

This description of Pelican Island in 1908 shows that the elevation of the waters of Malheur lake rose to heights claimed by the State of Oregon; the maximum elevation of Pelican Island is 4109 (Abs. p. 275, l. 26), but this is merely a small narrow stretch blown up of drifting sands, and if it was in existence in 1908 Finley does not describe it when he saw the matted tules on top of the island. An inspection of the contour map, Exhibit 3, shows that over fifty per cent of Pelican island's total area of 840 is below 4094, and when the water is at elevation 4096, 140 acres is above water. (Report of the Special Master; Volume 2, p. 84, 80.) So when Mr. Finley, a scientific man, a naturalist and a trained observer testified that when he camped on Pelican Island in 1908 and found the top a mass of matted tules, it is a conclusive proof of an elevation of Malheur Lake at least 3 and probably 4 or more feet above elevation 4093; this height of the lake is abundantly corroborated by the testimony referred to by the witnesses listed under our *Exception* 18 *and* 25, supra.

Cole Island. The witnesses describe the vegetation growing on Cole Island. It consisted of *tules*, Defendant's Exception 45, subdivision (c), sugar grass (subd. d), salt grass (subd. e), swamp grass (subd. f), forage grasses (subd. g), water grasses

(subd. h), wire grass (subd. i). These all required the standing water of the lake for their growth. Cole Island is not as high as Pelican Island, its elevation being 4095 or slightly above. (Abs. p. 293, l. 5.) Cole Island has an area of 350 acres above elevation 4093. Of this only 135 acres is above water when water reaches 4094; only 10 acres is above water when elevation 4095 is reached. (Report of the Special Master; Volume 2, p 80, 84). It is apparent that Cole Island was completely covered when there was any real water in the lake.

In the the month of February, 1914, engineers Cooper and Dodge, with the assistance of C. M. McConnell, attorney and H. Z. Smith, made a survey of Malheur lake on the ice, cut holes in the ice and took the elevations of the water surface as it rose in the ice every 1200 feet. They also found open unfrozen water. The information secured on this survey was platted, and the map was introduced herein as Defendant's Exhibit X-6. Details of this survey are summarized in the *Supplement* to this Brief, Appendix E. They found the actual water surface elevation of Malheur Lake in February 1914 to be 4094.60, which reduced by .332 to equate to government datum herein, shows a water surface elevation of the lake of 4094.26 in the driest part of the year.

Cooper and Dodge do not show any Cole Island on their map, Exhibit X-6; they and McConnell and Smith testify that Cole Island was not visible above the ice. (Abs. p. 906, l. 40-43; p. 901, l. 11-15; p. 902, l. 40-44; p. 901, l. 11-15). In attempted refutation of this the government asked Pecore the height of the island, (Abs. p. 293, l. 10-14) being barely above 4095, and showing the width of Cole island is 1,100 feet,

(Abs. p. 298, l. 19-25. Dodge admits the possibility of the higher portion of the island falling between their readings of 1200 feet, (Abs. p. 909, l. 26-48), but when we note that only 135 acres of Cole Island is above water when it is at elevation 4094, and only 10 acres when it is at elevation 4095, and that these elevations are given in 1931, after a series of dry lake bed with blowing and drifting sands, we assert it is a fair interpretation of the testimony that Cole Island did not extend appreciably above the ice in February 1914, when the water stood at elevation 4094.26, and that if anything existed there it was some tules extending above the ice. Certainly the evidence justifies a positive assertion that the so-called island was covered by water in the spring rises in the lake.

As to the so called island or islands west of Pelican island shown on the contour maps, Exhibit 3 and 3A, substantially all of them are below elevation 4094. It is possible that Dodge was referring to them as tule, (Abs. p. 909, 13-4), though he refers to an island east of Pelican which does not show on the maps, possibly a typographical error for *west*.

Graves Ridge It remains to discuss *Grave's ridge or island*. It has 370 acres above water when the elevation is 4094, and 26 acres when the elevation is 4095. (Report of the Special Master: Volume 2, p. 80).

A description of Wolf Lake in Hardin vs. Jordan, and Mitchell vs. Smale, shows conditions comparable to those found in Malheur Lake.

Furthermore any portion of Graves ridge above high water mark under the well settled rule that the actual water line and not the meander line is the boundary, belongs to John E. Graves, the rule stated in Mitchell vs. Smale and kindred cases. See also

Porter vs. Selleck, 236 Mich. 655, 211 N. W. 261.

If islands formed after the state was admitted by withdrawal of the waters such islands belong to the state.

Moss vs. Ramey, 239 U. S. 538, 60 L. Ed. 425, 36 Sup. Ct. Rep. 183.
Scott vs. Lattig, 227 U. S. 229, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242.
United States vs. Hutchins, 252 Fed. 841, 843 (D. C. W. D. Okla.).
United States vs. Romaine, 255 Fed. 253 (C. C. A. 9th).
United States vs. Stotts, 49 Fed. (2nd) 619, 620, (5, 7,) (D. C. W. D. Wash.).
58 L. R. A. 673, notes.
35 L. R. A. (N. S.) 227, notes.
Ann. Cas. 1931A, p. 782, notes.
Whiteside vs. Norton (1913), 205 Fed. 10, 12 (C. C. A. 8th).

We assert there are no facts in this case which justify the court in classifying that portion of the beds of the lakes involved above 4093 within the definition of islands under the rulings of this court in Scott vs. Lattig, 227 U.S. 229, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242, 44 L. R. A. (N. S.) 107 nor the cases from this court therein referred to. The so-called islands have no greater height than the sand bars with willows and other small vegetation springing up thereon, which has been the subject of so many decisions. The size, elevation and character of vegetation upon the knolls involved in this case show that substantially all, if not all, of even Pelican, Cole Island and Graves ridge, have been covered with water. The most dignified class of vegetation growing on any of them is a little greasewood, and a few small scattering sagebrush, and that only on the highest

point. The other vegetation is only such as grows and flourishes with water. These islands have been under water regularly and consistently.

Islands Generally As to the balance of the so-called islands in the lakes, a cursory examination of Appendix 14, pp. 74-80 of Volume 2 of the Special Master's Report, dispels any contention that they are hard, fast or stable lands. As appears on page 78 of this Report, 78% of all of the bed of the Malheur Lake westerly of a line drawn from the west branch of the Silvies to the Blitzen rivers is below elevation 4093, and only 21% above 4093; of this 21%, 14% is covered with water when it rises to 4094. Included in these figures are the so called Graves Islands, and a few places with higher knolls, designated on Exhibit 22 as Tracts 6, 11, 16, 24, 25, 26, 30, 32, 33, 41A. Easterly of said Silvies-Blitzen line 85% is below 4093 and 15% above 4093, of which 15% 11% is between 4093-4094, and included in this are the areas known as Pelican Island and the areas in white westerly thereof shown on Exhibit 3 and 3A, and Cole Island.

We assert there are no true islands in Malheur Lake and the Special Master erred in holding everything above 4093 constituted such and that title thereto is retained by the plaintiff.

In this case in support of the position of the state that there are no islands of fast or stable land involved and which should have been surveyed or could have been surveyed in 1895, we have the following facts:

1. The Manual of Surveying Instructions of June 30th, 1894 (and which is the same as those previously issued) provides that the surveyor shall

note "all islands." (Abs. p. 181, l. 4).

2. Meldrum failed to note any islands and therefor it is to be presumed that he found none in 1877.
3. Neal failed to note any islands and the same presumption exists as to the survey of 1895. This survey is not impeached herein by any allegation in the complaint or in the evidence for fraud, gross error or mistake.
4. Newby, Henry W., Special Agent of the General Land Office, made an examination of the Neal survey and reported it as having been properly made. (Abs. p. 262, Exh. X-10).
5. Cooper and Dodge made a survey in 1914 and found Pelican Islands, but there was no trace of Cole Island. Four witnesses present on that survey so testify.
6. A number of meander line witnesses had an interest in making the lake dry under the doctrine of accretion and reliction which was the law up to 1921 when the legislation pleaded in the amended answer went into effect.
7. The squatters had an interest in making the lake dry as they had squatted in most instances on the knolls and ridges which were bare except in the spring months and hoped to get these knolls and ridges under decisions of this court making them open to entry where they had initiated their settlement prior to the Roosevelt Reservation Proclamation, together with any dry lands added to these knolls and ridges by accretion and reliction under the Oregon decisions.

8. Disinterested witnesses like the naturalists, William L. Finley and Dr. L. E. Hibbard refute except as to Pelican Island and a small part of Cole Island and Graves Islands any contention that the rest of the so-called island area had any islands of stable, fast or substantial formation; and showed that all other so-called islands were completely covered with water during the normal recurring seasons of high water in the months from the break-up after February to some time in June or July.

There are no islands in the Narrows, Mud Lake or Harney Lake; some wind blown elevations are above 4093 in the Sand Reef Division at this time, as it has been dry for about ten years.

Considerable is said in the record about so-called paths or ways, which were taken at different times by persons in crossing the westerly part of Malheur Lake. An examination of the testimony invariably shows that it relates to the dry cycle of 1888-1889, which started in 1887, or to 1919, or since 1928, or that it was in the *fall* or *winter months*. A rather complete picture is given by the references to the testimony under Exception 67. In 1922 John E. Graves, the claimant of the so-called Graves ridge or island, drove a party of state and government men down the ridge *through the water*, including W. F. Staley of counsel for the plaintiff in the trial before the master, and L. A. Liljeqvist, state attorney, L. E. Hibbard and others. (Abs. p. 619, l. 10-25; p. 620, l. 35-46) Graves has seen about one-third of it under water. (Abs. p. 629, l. 36-39) The ridge was not used in the spring time. (Abs. p. 629, l. 36-39; l. 42-43 *The year 1920 is as far back as the ridge was used as a general pathway*. (Abs. p.

592, l. 14) The backwater of the lake showed on the Graves gage. (Abs. p. 264, l. 20) L. E. Hibbard stated *no hay had been cut below the Neal line prior to* 1899, the water was pretty high. (Abs. p. 579, l. 40) So we think that a ridge which has scattered on it a few knolls of sand aggregating 26 acres of land above 4095, with a little salt grass and greasewood on the higher places does not come within what the courts mean by fast, stable lands.

A description of the western part of the lake as late as 1916 is given by Dalton:

> "There was a lot of tules, and a lot of open water." (l. 40).

He stated the tules were heaviest around the edge of the lake. (Abs. 643, l. 32). As he went into the lake they became mere patches, and there was more open water. (l. 35). This witness also referred to the tule islands. (Abs. 644, l. 1-12).

Alfred L. Marshal testified there were channels all through the tules, and open places all through them. People went out in the channels and open places duck hunting. (Abs. 657, l. 5).

LeRoy Bunyard testified,

> "The distance the tule line ran out from the *edge of Malheur Lake* on the northerly side varied from half to three-quarters of a mile in places; where the water flowed into the lake it wasn't so far, probably a hundred or three hundred yards. Out beyond the tule line that extended half to three quarters of a mile was open water."

He again said,

> "That condition existed from the Silvies river down to the Narrows." (Abs. p. 659, l. 3-10)

Lloyd B. Culp describes his hunting exerience in

the lake in the western part of the lake in the Joe Hill vicinity, as follows:

> "We would go out with this boat and find an open place in the water and a big batch of tules, and then another batch of tules and open water, and all the way through it was like that." (Abs. 938, l. 33).

He also described his experience as follows:

> "If you were right up against the tules, you could not see the mountains around the edge whatever in the daytime, but if you were in the open water, you could see over the tules. I don't know how high the tules grew, but it was over my head. Standing up in a boat they would be as high as my head, and in some places awfully thick." (bs. 984, l. 1-7).

Lee Minis Caldwell testified that sugar grass grows four to five feet high, mostly where the *soil is wet, among the tules*, but not in alkali soil. (Abs. 647, l. 38).

John J. Heinz testified with reference to his place,

> "As fast as we took the tules the sugar grass would crowd in." (Abs. 661, l. 34).

The Narrows Division

(Report of the Special Master, pp. 127-128)

Exceptions 50-59

The Special Master held that the portion of the area involved which he has designated The Narrows Division (See Appendix 5, opposite page 5 of the Report), constitutes a *non-navigable stream*, and that the State of Oregon is the owner of that portion west of the Narrows bridge colored green *marked B* and fronting the uplands owned by the State on both sides of the channel. He further held that Oregon has no title

to the bed easterly of the bridge, colored purple, *marked A*. The Special Master is justified in treating this Division as a *stream*. Oregon claims it is navigable and so owns the bed up to ordinary high water mark thereof. Cook vs. Dabney, 70 Or. 529, 139 Pac. 721; Hume vs. Rogue River Packing Co., 51 Or. 237, 92 Pac. 1065; Montgomery vs. Shaver, 40 Or. 244, 66 Pac. 923, 924; Pacific Elevator Co. vs. Portland, 65 Or. 349, 380, 389-402, 133 Pac. 72, 82; State vs. Portland General Electric Co., 52 Or. 502, 531, 533, 98 Pac. 160, 161.

If the stream is non-navigable, Oregon is the owner of the portion marked B westerly of the Narrows bridge, for the rule of the common law as to non-navigable *streams* (as distinguished from other bodies of water) has been adopted in Oregon. Oregon Code 1930, Section 63-102, which is quoted on page 34 of the Report. See Micelli vs. Andrus, 61 Or. 78, 85, 120 Pac. 737, 740.

Oregon insists that the provisions of R. S. 2476, has no application and does not control after the United States patents or grants uplands on a *non-navigable stream*. See Hardin vs. Shedd, 190 U. S. 508, 519, l. 21; United States vs. Cress, 243 U. S. 316, 319-320. Neither do the provisions of 5251 R. S. apply. Id.

Oregon recognizes the general rule that an upper proprietor has a right to have waters flow off his lands in a natural channel, but does not concede that the United States is the owner of any lands in the Malheur Lake Division referred to by the Special Master; and furthermore that the United States has no interest in flowing waters in the State of Oregon. *Exception* 59.

(4) Was the Meander Line (81.198 miles) Laid Down by J. H. Neal in 1895-1896 and approved in 1897, a Correct Line?

(Report of the Special Master, p. 25)

Exception 60

The Special Master states that the United States challenges the correctness of the Neal line as a whole. Oregon asserts that the allegations of the Statement in Support of Motion for Leave to file Bill of Complaint filed by the Plaintiff herein, as well as the allegations of the Bill of Complaint are such as to constitute a conclusive *election* by the plaintiff foreclosing plaintiff from challenging the correctness of the Neal meander line; that the Bill of Complaint is entirely silent and contains no allegations sufficient to put in issue the correctness of the Line. The area involved is described in the Bill of Complaint as *lakes* and the lands involved as the beds of *lakes*.

We are unable to know what is the position of the plaintiff before this court until its Exceptions and Brief are filed, and shall reserve the privilege to more fully deal with this matter on the coming in and the filing of such Exceptions and Brief.

However, in brief, the refernces to the witnesses under subdivision (a) of Defendant's Exception 60, show the *correctness of the Neal line;* the references under subdivision (b) thereof, show a distinguishing characteristic of *vegetation indicating high water mark of the lake* at the approximate location of the Neal line, and the references under subdivision (c) refer to certain documentary evidence introduced by the plaintiff which conclusively prove the correctness of the Neal line, viz. principally the Official Field Notes and Plats.

Oregon further claims that any attempt herein to challenge the Neal line would be a collateral attack; and unavailing herein.

(5) Were there Relicted Lands within the Meander Line Boundary at the Commencement of the Suit?

(Report of the Special Master, p. 28)

Exceptions 61-70

The Special Master *refuses to make a finding upon this question*, on the ground that the legal questions between the United States and Oregon can be determined so far as necessary without passing upon this question; that to pass upon it might prejudicially affect the rights of third persons not impleaded.

Oregon asserts the ultimate facts are as stated under *Exception* 62. This lawsuit has cost all parties so much money that the whole controversy should be determined. Oregon tried to secure legislation through Congress enabling the whole controversy to be settled. It was passed but President Hoover vetoed the act on the advice of the attorney general. (Supplement to Report of the Special Master pp. iii-v). The attorney general of the United States in his opinion to the President erroneously assumed that the only question involved herein was the question of navigability and that if the area involved was held to be non-navigable it would end all claims of the State of Oregon, and the United States could sue the riparian owners and

settlers in the district court. (Id. v). How far wrong this position and advice was and is, must be apparent when the court reads the Report of the Special Master. Oregon in its argument before the Special Master, reiterated its position that the upland owners and settlers should be brought in, and a Receiver appointed of the *res* to settle any doubtful question of jurisdiction as was done in the Oklahoma vs. Texas case. The matter is discussed elsewhere in this brief.

On the merits of the question, Oregon claims that the evidence conclusively establishes that there has been no permanent recession of the waters and no land has been added by reliction to the lands of the upland owners bordering on the Neal meander line. Oregon asserts that the evidence discloses and the testimony adduced by the witnesses who are listed under Defendant's *Exception* 67 establish this. There is not a scrap of evidence to justify an inference that the present dry cycle will not end, if it has not *already ended*. Even in 1922 the waters of Malheur Lake flooded the Neal meander line and in 1928 it came approximately to if not entirely to the Neal line. Even one of the government attorneys who assisted in the trial of this case before the Special Master admitted on behalf of the plaintiff that the water in 1922 came to the Neal line. (Abs. p. 241, l. 25-33). And well he might for that was the year the party of state and government men including the writer of this brief made an inspection tour of the lake. The testimony referred to by the witnesses under *Exception* 67, abundantly establish where the water came in 1922 and 1928. The government's hydraulic engineer, L. T. Jessup, has made a tree ring study which he presents in his report, Exhibit 52, p.

24, and he has placed his study in a graph contained in said report, Figure 9. On this graph we find a study of climatic conditions based on tree rings, taken from four places described in the report, namely, 6 miles northwest of Burns, 21 miles west of Burns, on the pass between the Blitzen River and Catlow Valley, elevation 4840, and 5 miles south of French Glenn (same as P Ranch, shown on Appendix 15, in Report of Special Master, p. 24). Just how truly these locations may reflect water conditions in the lakes may be debatable. But Figure 9 of the tree ring graph, shows the tree ring study curve at zero of the graph in 1921-2. Now we know that in 1922 the water in the lake was at the Neal line, elevation 4093. So if the tree ring study proves anything it proves the water of the lake was at an elevation equal to or above 4093, most of the time since Oregon was admitted into the Union. A composite study of water conditions as shown in Appendix 17, Report of Special Master: Volume 2, pp. 89-94, giving the testimony of witnesses with references to the printed Abstract, Jessup's interpretation of the testimony of the witnesses as made before the Special Master in the briefs submitted to him showing such testimony, Jessup's tree ring study, precipitation records at Camp Harney from 1872-1878 (partially incomplete), at Diamond from 1891-1900, 1911-1914, at Blitzen, from 1917-1920, 1922-1930, at Burns in 1901, 1904-1914, 1918-1920, and at Harney Branch Experiment Station in 1898, 1900-1, 1904-1930, gives a comprehensive view of the evidence showing the nature of the water conditions from 1853 to date, and the tree ring study prior to that date. The run off data, taken from Jessup's report Exhibit 52 and Appendix there-

to, and the Exhibit as a whole negative any possible theory of a permanent recession of waters or addition of lake bed lands to the uplands by reliction. The Special Master should have made a finding that there has been no reliction, letting the chips fall where they may; and the court should bring in the persons not impleaded so that the controversy may be finally determined.

The cases cited by the Special Master on page 30 of his Report, seem to be beside the mark.

The evidence in the case at bar conclusively establishes that there has been no permanent recession of water. *Reliction* means lands permanently uncovered by the recession of waters. Lands which are alternately covered and uncovered by the rise and fall of waters by fluctuations of the seasons or different parts of the year, or where the recession is not permanent, do not constitute relicted lands. Hence when Oregon's lake legislation was enacted which is pleaded in the Amended Answer, there was no permanent reliction and no lands have been added by accretion or reliction on the meander line to the upland owners.

Sun Dial Ranch Co. vs. May Land Co., 61 Or. 205, 218, 119 Pac. 758, 762.

34 Cyc. 1104.

Sapp vs. Frazier, 61 La. Ann. 1718, 26 So. 378, 380, 72 Am. St. Rep. 493.

State vs. Thompson, 111 N. W. 328-329; 134 Ia. 25.

Hammond vs. Shepard, 186 Ill. 235, 242; 78 Am. St. Rep. 274, 277, 57 N. E. 867, 868.

Anderson vs. Ray, 156 N. W., 591, 593 (2); 37 S. D. 17, 22, 23.

Flisrand vs. Madson, 35 S. D. 457, 469, 471; 152 N. W. 796, 800, 801.

In re Judicial District Proc. No. 15, 167 N. W. 1042, 1044 (3).
Meeker vs. Kantz, 239 N. W. 27, 28.

In re Judicial Ditch Proceeding No. 15, 140 Minn. 233, 167 N. W. 1042, 1044, the Supreme Court of Minnesota held that a meandered lake did not cease to be such for the reason that it *dried up during certain unusually dry seasons prior to* 1900, it appearing that the lake again filled up from natural causes in 1902. The court said:

> "The lake did not lose its character as a meandered lake by a mere temporary recession of its waters. To have that effect a recession must be permanent."

The rule has never been more accurately stated than in Flisrand vs. Madson, 152 N. W. 796, 35 S. D. 457, where the court said:

> "Reliction is land added to a tract fronting upon the waters of a lake, pond or stream, by the permanent uncovering of the land—the laying bare of the bottom by the permanent retirement of the waters, never to return again. The temporary subsidence of the waters occasioned by the seasons, or by periods of drought, does not constitute reliction in the sense of an addition to the contiguous land. Reliction is said to rest in the law of nature, and is analogous to the right of the owner of a tree to its fruit. Where water periodically rises over land and then recedes, there is no reliction. . . . . But *however where the adjoining proprietor owns the title to the bed of the lake, it is immaterial when or how the shore is enlarged or the waters recede.*

(6) Are the Grants Made by the United States to Lands Bordering Upon the Meander Line Boundary Comparable in Form to Those Involved in Hardin vs. Jordan, 140 U. S. 371?

(Report of the Special Master, p. 31)

No exception has been taken to the facts stated by the Special Master on pages 31 and 32 of his Report; and the facts are accurately stated; the legal conclusion to be drawn therefrom is elsewhere discussed by him, under his discussion of Questions of Law (1), (2) and (3); and we likewise deal with this matter under such heads.

B

(1) Is the Common Law in Respect of the Effect of Conveyances of Lands Bordering on a Meandered Lake (i. e. That the Grantee Takes to the Center of a Lake) in Force in Oregon, or Does the Local Law Provide that the Grantee Takes Only to the Water's Edge?

(Report of the Special Master, p. 33)

Exceptions 71-80

The organic law of the provisional government of Oregon passed June 27, 1844, provided as follows:

> ". . . . . the common law of England and principles of equity, not modified by the statutes of Iowa or of this government, *and not incompatible with its principles*, shall constitute a part of the law of this land."

This law was in force in Oregon when its constitu-

tion was adopted, and Article 18 of the Constitution provided:

> "All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until *altered or repealed.*"

The Special Master in proposed Finding III, cites these provisions (Report, p. 76), and the cases wherein it was interpreted, and turning to Hardin vs. Jordan, he finds that the court has construed Bristow vs. Cormican, L. R. 3 App. Cas. 641, to declare that under the common law the upland owner owns to the center of a non-navigable lake, and accordingly the Special Master herein concludes, that:

> "The common law of England is the law of Oregon." (Report, p. 33, 76, 67, subd. 2, 35).

The Special Master has totally misconceived the law of Oregon. He has overlooked the phrase qualifying the adoption of the common law to only so much thereof as is "not incompatible with its (the government of Oregon) principles." He has failed to read correctly the Oregon cases. This is the first time to our knowledge that anyone has attempted to assert that the common law of England is the common law of Oregon.

In Carson vs. Gentner, 33 Or. 512, (1898), it was held that the doctrine of the common law that the water of a stream must continue to flow in its natural channel undiminished in quantity and unimpaired in quality, has been very much modified in the Pacific States, and in further discussing this matter the Oregon supreme court said:

> "*So much, only*, of the common law was adopted by these settlers, *as was applicable* to the

condition of the country in which their lot was cast."

Again referring to the provisions of the Constitutional provision above cited, and a statute as to courtesy adopted in 1854, the court said in Runyan vs. Winstock, 55 Or. 202, 204 (1909):

> "But this section of the constitution wrought a radical change in favor of the wife, in that it deprived her husband of the control, rents and profits of her realty."

In In re Willow Creek, 74 Or. 592, 623, (1914-1915) the court said:

> "The old rule of 'continuous flow' has been changed by custom and crystalized into express law by statute."

In Perry vs. Fletcher, 93 Or. 43, 52 (1919) the Oregon Supreme Court stated:

> "The common law, as it existed in England at the time of the settlement of the American colonies, *has never been in force in all of its provisions* in any colony or state of the United States. *It has been adopted so far only as its general principles were suited to the habits and conditions of the colonies, and in harmony with the genius, spirit and objects of American institutions.* Different geographical conditions may justify modifications, and whether common-law rules will be followed strictly in the United States will, necessarily, where no vested rights are actually concerned, depend upon the extent to which they are reasonable and in consonance with public policy and sentiment. What may be the common law in one state is not necessarily so considered in another. In many jurisdictions in the United States the rules of the common law of England have been held by the courts to be in full force so far as the same are applicable

> and of a general nature, and *are not in conflict* with the Constitution or *special enactments of the legislature. This is the rule in Oregon.*"

In In Re Determination of Water Rights of Hood River, 114 Or. 112, the Pacific Power & Light Company sought to invoke the rule of the common law that the *riparian owner* was entitled to the full flow of the stream through his land except as it might be affected by reasonable use made thereof by other *riparian* owners, and that no one except a riparian owner could divert any water from the stream. On page 163 the Supreme Court of Oregon cites 40 Cyc. 557 to the effect that the common-law rules as to riparian rights are always subject to change and modification by statute; and that in many of the western states the common-law doctrine of riparian rights has been abrogated or curtailed by constitutional or statutory provsions or the course of judicial decisions, because entirely unsuited to the natural conditions of the country or inconsistent with the proper development of its industries and the beneficial use of water which was deemed of paramount importance. And the Supreme Court on page 166 of this decision stated:

> "The principles of the *common law of England* have been adopted in the State of Oregon *only so far* as the same are *applicable to our conditions* and *in consonance* with the *public policy, Constitution and statutes of the state.* The common-law rule, as to riparian rights to water, has been greatly modified in Oregon."

The Court then cites the Constitutional provision above referred to.

Under the doctrine of the common-law non-navigable lakes and non-navigable streams become pri-

vate property and the public can neither fish nor hunt thereon, nor can the streams be used for floatage of the products of the field and forest. This is not the rule in Oregon.

A stream capable of floating logs and other products of the forest unaided by artificial means during freshets or stages of water occurring with reasonable frequency and continuing long enough to make its use of commercial value, is a public highway for that purpose; a stream which is not such a highway cannot be made so by use of dams or artificial means, nor can one which is navigable for such purposes for certain periods of the year be made so by artificial means at other times.

Felger vs. Robinson, 3 Or. 455.
Flinn vs. Vaughn, 55 Or. 372, 373, 106 Pac. 642.
Guilliams vs. Beaver Lake Club, 90 Or. 13, 175 Pac. 437.
Haines vs. Hall, 17 Or. 165, 173, 20 Pac. 381.
Haines vs. Welch, 14 Or. 319, 323, 12 Pac. 502.
Hallock vs. Suitor, 37 Or. 9, 11, 60 Pac. 384.
Hunter vs. Grande Ronde Lumber Co., 39 Or. 448, 451, 65 Pac. 598.
Kamm vs. Norman, 50 Or. 9, 11-17, 91 Pac. 448, 449. Leading case in Oregon.
Lebanon Lumber Co. vs. Leonard, 68 Or. 147, 149, 150, 136 Pac. 891, 892.
Logan vs. Spaulding Logging Co., 100 Or. 731, 735, 190 Pac. 349, 350.
Shaw vs. Oswego Iron Works, 10 Or. 371.
Trullinger vs. Howe, 53 Or. 219, 222, 97. Pac. 548, 99 Pac. 880.
Weise vs. Smith, 3 Or. 455.

It can be readily seen from the foregoing what a far departure there is in the law of Oregon and those states which prevent the members of the public from

hunting or fishing on non-navigable lakes and non-navigable streams. Putnam vs. Kinney, 248 Mich. 410, 227 N. W. 741; Snively et al vs. State, 9 Pac. (2nd) 773 (Wash).

It is rather difficult to reconcile the Putnam case, supra, with Colliss vs. Gerhardt, 237 Mich. 38, 211 N. W. 115, and cases therein cited.

In the case of Guilliams vs. Beaver Lake Club, 90 Or. 13 (1918), the Supreme Court of Oregon had before it the question of the right of the public to use a non-navigable stream which was fifty feet wide and three and one-half miles long and capable of floating on a certain portion of its course skiffs and small boats and scows. This enlargement of a non-navigable stream to a width of fifty feet did not bring it within the class of a lake, and the attempt was made to prevent the public use of the waters of this stream, and though the Supreme Court of Oregon conceded for the purposes of the opinion that the title to the bed of such non-navigable stream was in the riparian owner as is well-settled by the Oregon decisions, particularly, see Micelli vs. Andrus, 61 Or. 75, 85, held:

> "While there are many authorities which seem to lean to the doctrine that the present use of a stream for the purposes of *trade or commerce* is the test of its navigability, we are not prepared to say that such is the *only test*, or to go so far even as to say that its only test is its capacity to carry goods or articles of trade to and from the place where they are marketed. This is comparatively a new country and there are many streams and lakes whose shores are sparsely if at all settled and which in their natural state may, as settlements along their borders continue, be-

come valuable highways for the carriage of the produce of those who may reside along their banks. Public highways may be constructed and towns built where people may reside for the purposes of health, pleasure, or profit, and where actual navigability of the water exists, courts should not lightly consign them to unrestricted private ownership. Whatever may be the title to the bed of such streams or bodies of water (and it may be conceded in this case that such title is in the riparian proprietors) they do not own the water itself but only the use of it as it flows past their property. Under the conditions prevailing in this comparatively new country we are not prepared to say that *bank conditions* upon a stream actually navigable so far as water conditions are concerned, should always be controlling. . . . . Even confining the definition of navigability, as many courts do, to suitability for the purposes of *trade and commerce*, we fail to see why commerce should not be construed to include the use of boats and vessels for the purposes of pleasure. The vessel carrying a load of passengers to a picnic is in law just as much engaged in commerce as the one carrying grain or other merchandise. We think it only fair to assume that a train carrying passengers only between Portland and San Francisco is as much engaged in interstate commerce as any other train on the road. One has only to glance at the multitude of definitions of 'commerce' collected in 'Words and Phrases' under that title to see what an extended meaning the courts have given it. Take the case at bar as an example. Here is a body of water 3½ miles long with an average width of at least 50 feet, and a depth capable of floating successfully skiffs and small boats of average size, and scows capable of conveying cattle, hay and other

products, and affording a surface over which people may travel for pleasure, or for the purpose of fishing and of which the defendant is one of several riparian proprietors. Is it in accord with sound public policy that each riparian owner shall have the right to fence his portion of the stream and say to those above and below him, 'This body of water is mine; "Thus far shalt thou go and no farther" '? We think not. While perhaps a majority of the decisions would, upon a cursory reading, appear to sanction such obstruction, and while some actually seem to apply the common-law rule in regard to navigable waters to our smaller fresh-water streams, a careful examination of these decisions will show that such streams were not in fact navigable, but, on the contrary, boats were merely pushed and hauled over the shallow beds, and that this so-called 'navigation' was used as a pretext to enable the 'navigators' to trespass on lands not their own for the purpose of fishing and hunting. In the case at bar the stream has well-defined banks, a well-defined channel, and a fairly constant depth of water to enable boats of the description above set forth to traverse its waters at all seasons, and to that extent we hold that it possesses a qualified navigability."

The case of Guilliams vs. Beaver Lake Club is particularly significant for the reason that the decision was rendered in 1918 and prior to the legislation pleaded in the Amended Answer. In this case the Supreme Court of Oregon cites and refers to the State of Minnesota as setting forth the rule of law applicable to Oregon. An extensive quotation is made from the case of Lamprey vs. State, 52 Minn. 181, and this case and the citation quoted by the Supreme Court of Oregon with approval is given else-

where in this Brief where we discuss Lamprey vs. State, and we refer the court at this time to that discussion. The Supreme Court of Minnesota in that case broadens the definition of navigability to *include lakes* which were *valuable to the public for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural and city purposes, cutting ice, and other public purposes* which cannot now be enumerated or even anticipated. That court, as did Oregon, extended the meaning of navigability by declaring all waters public highways which afford a channel for any useful commerce, including small streams merely floatable for logs at certain seasons of the year. The court held that the *size of the boats or vessels* was not important, *bodies of water usable for public purposes other than mere commercial navigation made such waters navigable or public waters.*

It is self-evident that when the law of a state is that the owner of uplands on a correctly established meander line of a non-navigable lake owns to the center of the lake, as is the law in some states, Richardson vs. Sims, 118 Miss. 732, 80 So. 6, following Hardin vs. Jordan's declaration of the Common law, that then the question of whether lands are *added* to the uplands by *reliction*, viz. permanent uncovering of the waters adjoining such uplands, is *immaterial.* Reliction means land added to a tract fronting upon the waters of a lake, pond or stream by the permanent uncovering the lands, the laying bare of the bottom by the permanent retiring of the waters, never to return again. In Flisrand vs. Madson, 152 N. W. 796, 35 S. D. 457, the Court stated elementary law when it said:

"But however where the adjoining proprietor

owns the title to the bed of the lake, it is *immaterial when or how the shore is enlarged or the waters recede."*

The government in this case has offered in evidence an article by the Chief of the U. S. Biological Survey, published in the Saturday Evening Post, February 9, 1929, as Plaintiff's Exhibit 33. This article is with reference to Goose Lake and it is cited as having some bearing upon Malheur Lake because the article shows that Goose Lake went dry sometime in the sixties, just as Malheur Lake went dry in 1931. This lake is also commented upon by L. T. Jessup, Hydraulic Engineer, in Plaintiff's Exhibit 52, page 29. The theory of the government is that the lakes in the case at bar are non-navigable and that Goose Lake is non-navigable. It would therefore follow that if the common law in Oregon were in effect, giving the upland owner the title of the bed to the center of a non-navigable lake, that the problem of reliction upon such a non-navigable lake would not be involved in a lawsuit.

In the case of Hanson vs. Thornton, 91 Or. 585, 589, 179 Pac. 484 (1919), the Supreme Court of Oregon had occasion to determine what was the effect of the fact that for ten years prior to the commencement of the suit the waters of Goose Lake had gradually receded from natural causes and the recession of said waters had laid bare a narrow strip of land between the meander line and the actual water's edge; which land was entered upon by the defendant. The plaintiff brought suit to quiet his title thereto and enjoin trespass thereon. Here then we have presented to the Supreme Court an opportunity to state that the plaintiff was the owner to the center of the

lake and the problem of accretion and reliction was not involved. The Supreme Court of Oregon in this case held that there was a reliction and the upland owner took title to so much land as was uncovered by the permanent recession of the waters, and a decree was entered in favor of the plaintiff.

It is perfectly evident that if the English common law were in effect in Oregon the court would have held that the plaintiff was the owner to the center of the lake and no problem of accretion or reliction was involved. It is clear that the Supreme Court of Oregon has not recognized the rule of the common-law as applicable to so-called non-navigable lakes.

Finally, in exemplification of the rule we are here presenting, two cases were brought to the Supreme Court of Oregon involving the question of title on the south side of Malheur Lake, the identical lake invoved herein. The first case is French Glenn Livestock Company vs. Springer, 35 Or. 312, 58 Pac. 102 (1899), which case was reviewed by this court in 185 U. S. 47. The second case is Cawlfield vs. Smyth, 69 Or. 41, 138 Pac. 227 (1914).

Under Defendant's *Exception* 21, page 24 of Defendant's Exceptions to the Report of the Special Master, is found a reference to the Exhibits, showing that the attorneys in those cases took the position and urged in pleadings and brief that Malheur Lake was non-navigable. Defendant offered in evidence Defendant's Exhibit X-4, a certified copy of the proceedings in the Supreme Court of Oregon in the French Glenn Livestock Company case and the Colwell case, a companion case thereto which also was decided by the Supreme Court of Oregon at the same time the Springer case was decided, and which case

was also reviewed by this Court at the time it reviewed the Springer case. (Abs. p. 145-147, p. 260 l. 21).

We direct the attention of the court that in the Springer and the Cawlfield cases attempts were made by the attorneys in those cases to secure a decision from the Supreme Court of the State of Oregon that these lakes alleged in those cases to be non-navigable bodies of water should have applied to them the decisions of some courts that the upland owners took to the center of the lake. The Supreme Court of Oregon refused to so rule in either the Springer or the Cawlfield case. (See 35 Or. 312, 319, 58 Pac. 102, 103; 69 Or. 41, 47, 138 Pac. 227, 229). On the contrary, the Supreme Court of Oregon in the Cawlfield case merely gave the upland owner title to lands, if any, which had accrued to him by permanent reliction, and the court said:

> "Until legislation of the state has changed its policy on this point, we must hold that the riparian owner of lands granted by the general government abutting upon a correctly established meander line is at least entitled to follow the water of the lake or river thus meandered no matter how far it may recede."

In the case of Cawlfield vs. Smyth, 69 Or. 41, 138 Pac. 227, the parties to that case conceded or took the position that Malheur Lake was a non-navigable lake, and based upon that theory, the plaintiff sought to secure a ruling from the Supreme Court of Oregon that the owner of a non-navigable lake owned to the center of such a lake. Cawlfield was the owner of lands made fractional by the Neal meander line of 1895 and Darius R. Smyth, a witness in the case at bar, claimed some lands below him, and attempted to

invoke the same theory that was invoked in the case of French Glenn Co. vs. Springer, 35 Or. 312, 58 Pac. 102, namely, that the meander lines were not correctly run nor were they the approximate boundary of a lake. The Court gave an erroneous instruction upon the law of reliction apparently attempting to apply the Indiana rule (See Stoner vs. Rice 121 Ind. 151, 22 N. E. 875; this and other Indiana cases are discussed by Mr. Justice White in his dissenting opinion in Kean vs. Calumet Canal Co., supra). The Supreme Court held that this instruction was erroneous and applied the ordinary doctrine of accretion and reliction wherein the Supreme Court of the State of Oregon has established the rule, (and in this respect applied the same rule heretofore announced by the Supreme Court of the United States). The Supreme Court of Oregon in the Cawlfield case refused to establish the doctrine as had the courts of some other states, that the owner of the uplands of a non-navigable lake owns to the center thereof.

All of the evidence in the Cawlfield case tended to show that the Neal meander line was correctly established, and the case in its legal consequences is an exact antithesis of the case of French Glenn Company vs. Springer, 35 Or. 312, 58 Pac. 102, and which case was taken to the Supreme Court of the United States, and in which case this court, like the Supreme Court of Oregon, held that it was a question of fact for the jury to determine whether Malheur Lake existed at the Meldrum meander line and jury having found, as a matter of fact, that there was no lake approximately at that place, the decision of the jury on this question of fact was conclusive.

Here then were two attempts made by the attor-

news in the Springer case and the Cawlfield case to induce the Supreme Court of Oregon to follow the rule of the common law that the upland owner on a meandered lake which is non-navigable (so conceded by the parties in such cases) owns to the center of the lake. The Supreme Court of Oregon refused to do that but held that the law of reliction was the doctrine applicable to said lakes. It is self-evident that this determination of the Supreme Court of Oregon is a conclusive indication that the common law of England is not the common law of Oregon, and that the upland owner on a non-navigable lake, (as those lakes were conceded to be by private litigants) did not own to the center of the lake.

Therefore the Special Master in this case instead of holding that "the common-law of England is the common-law of Oregon," should have held as suggested in our Exception 74, pp. 62-63 of Defendant's Exceptions filed herein; and following that holding he should have held that the common-law rule of ownership of the upland owner to the center of a lake does not apply in Oregon. As we see elsewhere in this Brief under the discussion of the proposition numbered 6 under the Questions of Law specified by the Special Master in his Report (Report p. iii), it is perfectly apparent that it was within the competency of the State of Oregon, *either by judicial decisions or legislation, or both*, to declare what the local law was. We assert that the local law has been established in Oregon by judicial decision that the upland owner does not own to the center of a non-navigable lake, and that the statutes of Oregon are a valid and constitutional exercise of the power of the state in declaring the local law.

There is accordingly left no opportunity for this court to attempt to pronounce, upon the theory of the absence of a declaration by the state of its local law, a doctrine that the common-law of England applies to Oregon.

That the State of Oregon is not bound by declarations of courts or private parties in private litigation is evident from the case of Gillihan vs. Ci[illegible]ha, 74 Or. 462, 145 Pac. 1061 (1915) wherein the question arose as to the ownership of accretions by certain sand which had been dumped or pumped against the bank of a private owner. The Supreme Court of Oregon said (74 Or. 467):

> "As against everyone *but the state*, concerning the rights of which we express no opinion, plaintiffs are the owners of any artificial extension of the land caused by dumping or pumping sands against the bank."

Practically the entire Report of the Special Master is based upon the premise that the common-law of England is the common-law of Oregon. As we have seen, the courts in Oregon as well as the legislature of Oregon, have held it is "incompatible with its principles" (the principles of the government of Oregon) and such common-law does not constitute a part of the law of the land, and the Oregon courts and legislature have held that it is incompatible with the principles of this government that the meandered lakes of Oregon should be made into private ponds, and that the ownership of the beds should be relegated to the riparian proprietors. The common-law has been legally and validly abrogated in many respects and curtailed by constitutional and statutory provisions and the course of judicial decisions in Oregon.

The *major premise* adopted by the Special Master herein that the common-law of England is the law of Oregon is *incorrect*. The entire *superstructure* built by the Special Master upon this *erroneous premise* must fall. Oregon's *Exceptions* 71-80, inclusive, we submit are well taken, and the Special Master's Report should be held erroneous in this respect.

The reference in the organic law of Oregon passed June 27, 1844, supra, to the statutes of Iowa is in reference to the historic fact that the only book of statutes in Oregon when this law was adopted was a volume of the Iowa statutes brought by a pioneer to Oregon around Cape Horn and consequently used as a reference by the lay pioneer law makers until something better was worked out. Inasmuch as at that time there were no statutes of Iowa throwing any light upon the particular problem here involved, the reference is immaterial herein.

(2) If the Common Law as Declared in Hardin v. Jordan is in Force in Oregon, is that Rule Applicable to Lakes of the Character and Size of Malheur and Harney Lakes, or Should they be held Exceptions and the Rule Declared Inapplicable Thereto?

(Report of the Special Master, p. 36)

Exceptions 81, 82

The Special Master presents this question in his Report (Report, pp. 36-37) and cites authorities and

law articles showing the seriousness of the question and states:

> "I do not assume to reach any conclusion on this point but merely call it to the attention of the court." (Report, p. 37).

Conspicuous examples of states recognizing title to the center of a lake are the State of Washington (Snively vs. State, 9 Pac. (2d) 773) and the State of New York (Gouveneur vs. Nat. Ice Co., 134 N. Y. 355, 18 L. R. A. 695.)

The inherent political and economical error in giving up to private owners the beds of lakes which by their size are susceptible of valuable public uses is illustrated by the recent decision by the Court of Appeals of the State of New York in Granger, et al. vs. City of Canandaigua, 257 N. Y. 126, 177 Northeastern 394. The State of New York in the Gouveneur Case, supra, and the case of Smith vs. City of Rochester, 92 N. Y. 463, 476, seemed to be committed to the doctrine of the ownership of the beds of lakes by the riparian owner. The inherent injustice of this rule has led to its partial abandonment in the Granger case by the State of New York. The court in this case seems to be stumbling without any definite public policy before it. It undoubtedly found itself embarassed by the prior decisions of its courts. The court in the Granger Case said navigability is not the determining test in all cases nor was size. Shape seems to have been a factor. The court said:

> "No more definite rule of general application may be stated as we pass only on the case before us. Conditions may alter cases but we hold that title to the bed of Canandaigua Lake is in the State of New York in trust for all the people thereof."

It is apparent how much more far-sighted have been the states as we see elsewhere in this brief which hold that bodies of water such as the lakes involved in the case at bar are by the very fact of their extent public waters and the beds thereof should not be granted to the riparian owners. The legislation of Oregon is in consonance with practical experience, with advanced public policy and for the preservation of the waters and the beds of lakes for the public for all ages to come. In the case at bar those portions of the beds of the lakes which are susceptible of reclamation should be reclaimed. Other lakes which are non-navigable in the federal sense must still be retained as public waters and the beds thereof owned by the state. The many lakes set forth in Defendant's Exhibit X-5 and described by the witness Stanley Jewett should be retained as public lakes in the judgment of the State of Oregon and its legislation has so declared and its legislation is in conformity with the decisions of this court.

Other states have recognized title to the center of only small ponds usually within the boundaries of private lands. Those states applying the small pond doctrine to the larger lakes are, however, in the hopeless minority. Far sighted states like Oregon have by statute and/or judicial decision, applied the doctrine of *navigable* (in the state sense) or *public waters* to these lakes, and applied the same rule as to the riparian owner as they have to navigable streams and lakes in the Federal sense.

The Report should have held that the size of the lakes involved in this case is so great in extent that they should be held exceptions in any event to the rule of the common-law as announced in Bristow vs.

Cormican and followed in Hardin vs. Jordan.

Upon this question see the very illuminating opinion of the court in Boardman vs. Scott (1897), 30 S. E. 982, 984-7.

(3) If the Rule in Oregon Limits the Grantee to the Water's Edge does the Title from the Water's Edge to the Center of the Lake Pass to the State of Oregon or Remain in the United States, if and When the Latter Patents or Otherwise Conveys the Upland?

(Report of the Special Master, p. 37)

Exceptions 83-112

The first important opinion by this court on the title to the bed of a meandered non-navigable lake is Hardin vs. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, decided May 11th, 1891. It appears from the facts stated in this case and the subsequent case of Hardin vs. Shedd and Kean vs. Calumet Canal & Improvement Company, all of which involved the same lake, that in 1834 surveys were made by the United States of a certain township south of Chicago, and a lake, really consisting of two bodies of water known as Wolf Lake in Illinois and Lake George in Indiana were meandered and the surveys were approved. The fractional lots resulting from the meander line were numbered in the usual manner. About the year 1874 the waters of the lakes had in great part disappeared. Various per-

sons settled on the uncovered lake beds with the intent of acquiring title under the homestead laws. Application was made to the Interior Department for a survey thereof and as a result a survey was made in 1875 known as the *Wolcott survey*. This survey was unsuccessfully contested in the land department by riparian owners owning lots on the meander line of the 1834 survey.

Patents were then issued by the United States to the beds of the lakes as established by the Wolcott survey. On the Indiana side of the state line the upland lots on the 1834 *survey* were granted to the state as swamp lands under the swamp land act. Gertrude H. Hardin became the owner of certain lots on the Illinois side of the state line my mesne conveyances from the original meander line proprietors under the 1834 *survey* and *she claimed title to the center of Wolf Lake* as riparian owner and brought suit against defendant Jordan, who claimed title to portions of the bed by virtue of certain patents issued thereto under the *Wolcott survey of* 1875. The court below gave title to Mrs. Hardin to low water mark, and to the defendant Jordan to the bed below low water mark. With reference to the plat of the 1834 survey and the patents issued to Mrs. Hardin's precedessors in title, this court said:

> "The lake itself on said plat was marked with the words "Navigable lake," although the fact found by the court is that the lake *was not and is not a navigable lake, but a non-navigable fresh-water lake or pond.* The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general,

thereby adopting the plat as a part of the instrument.

Such being the form of the title granted by the United States to the *plaintiff's ancestor*, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. This question must be decided by some rule of law, *and no rule of law can be resorted to for the purpose except the local law* of the State of Illinois."

The court then quotes from the opinion of Mr. Justice Clifford in the St. Paul & P. R. Co. vs. Schurmeier, 74, U. S. (7 Wall) 272, 19 L. Ed. 74, stating the law as to meander lines, and states:

> *"It has never been held that the lands under water, in front of such grants are reserved to the United States*, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters." Id. p. 381.

The court then used the expression "inures" with reference to the title of states to lands under navigable waters, an expression which is criticized by the Special Master in his Report, p. 39. We are unable to concede that this word caused subsequent erroneous decisions. Even Mr. Justice White in his dissenting opinion in Kean vs. Calumet Canal & Improvement Co. (190 U. S. 481, 47 L. Ed. 1145) used the word "transmitted" with reference to the title of lands under navigable waters which become the property of the States upon their admission. Yet the prior decisions of this court had settled the law

and the nature of the title to lands under navigable waters and the derivation of the state's title thereto. There is an unbroken line of cases before and after Hardin vs. Jordan settling the question and we do not believe the word "inures" has any significance herein. In its opinion the court stated:

> This right of the States to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the *law of each State to what waters* and to what extent this prerogative of the State over the lands under water shall be exercised.

This court then announced a rule of law which has been cited innumerable times by this court, the lower federal courts and state courts. This rule has never been qualified or overruled and it was pronounced as a rule of law, *applicable to all waters*, and pronounced in a case wherein there was involved a *non-navigable* meandered lake. This court said:

> "In our judgment the *grants* of the government for lands bounded on streams *and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie.*" P. 384.

The Supreme Court then attempted to state what was the law in the State of Illinois, and it came to the conclusion that *the State of Illinois had decided* that the owner of the upland on the meander line owned to the center of the lake. It accordingly gave judg-

ment in favor of the plaintiff, Mrs. Hardin, and reversed the judgment of the state court below.

Mr. Justices Brewer, Brown and Gray, the latter being the Justice who wrote the famous decision in the case of Shively vs. Bowlby, dissented, *only, however,* because these judges understood that the law of Illinois gave the title to the upland owner only to the waters edge and not the center of the lake. These three dissenting judges *agreed* with the majority opinion *that the title to the bed of a meandered, non-navigable lake is to be determined in accordance with the law of the state.* In other words, the *entire Supreme Court unanimously agreed upon this legal proposition* and we confidently assert that this proposition has never been departed from by this court, and the decision in the case of United States vs. Holt State Bank cannot be deemed an attempt to overrule this principle enunciated in Hardin vs. Jordan and later cases. The dissenting opinion of Justice Brewer concurred in by Mr. Justice Gray and Justice Brown on this point was as follows:

> "Mr. Justice Gray, Mr. Justice Brown and myself are unable to concur in the foregoing conclusions. Beyond all dispute the settled law of this court, established by repeated decisions, is that the question *how far the title of a riparian owner extends is one of local law.* For a determination of that question the statutes of the State and the decisions of its highest court furnished the best and the final authority."

The dissenting opinion concludes as follows:

> Believing that the law of Illinois has been determined by its Supreme Court, we think that determination is conclusive on this court. As strengthening the views we have expressed, may

also be noticed the opinions of the Circuit and District Judges, in this very case, on separate trials, (see 16 Fed. Rep. 823,) both announced before the decision in 120 Illinois, and agreeing that under the laws of Illinois the title of the riparian owner stopped with the water. The long judicial experience of those judges and their familiarity with the laws of Illinois give to these opinions great weight. We, therefore, dissent from the conclusions of the court." (140 U. S. 402, 405-6, 35 L. Ed. 440, 441).

Finally that there can be no question as to the rule promulgated in Hardin vs. Jordan, and recognized by both the main opinion and the dissenting judges, we need call attention only to the following statement in Shively vs. Bowlby, 152 U. S. 1, 45, 38 L. Ed. 331, 348, by Mr. Justice Gray who was one of the dissenting judges in the Hardin case:

"In the recent case of Hardin vs. Jordan, 140 U. S. 371, in which there was a difference of opinion upon the question whether a survey and patent of the United States bounded by a *lake* which is *not navigable* in the state of Illinois was limited by the margin or extended to the center of the lake, *all the justices agreed that the question must be determined by the law of Illinois.*"

And as we have seen the State of Illinois held as to this *meandered non-navigable lake*, that the State of Illinois was the owner of the bed of Wolf Lake (Fuller vs. Shedd, 161 Ill. 462, 44 N. E. 286), and the supreme court followed the state law in the subsequent case of Hardin vs. Shedd, supra.

It is clear from the case of Fuller vs. Shedd, 161 Ill. 462, 44 N. E. 286, 33 L. R. A. 146, Hammond vs. Shepherd, 186 Ill.235, 242, 57 N. E. 867, 868, 74 A. S. R. 274, 277 and Hardin vs. Shedd subse-

quently decided by this Court that this court had misunderstood the rulings of the Supreme Court of Illinois. The true rule in Illinois as a matter of fact was as the dissenting justices in Hardin vs. Jordan asserted, that the upland owner of a non-navigable, meandered lake only owned to the water's edge, and it is apparent that the dissenting opinion in Hardin vs. Jordan really stated the Illinois rule, and the Supreme Court of the United States in trying to follow the *very rule* enunciated in both the *majority* and *minority opinions* in Hardin vs. Jordan, should have determined that the plaintiff Hardin took only to the waters edge. *This it did subsequently in Hardin vs. Shedd.*

The decision in Hardin vs. Jordan was followed in a similar case on the same lake in Mitchell vs. Smale, 140 U. S. 371, 406, 35 L Ed. 442, 11 Sup. Ct. Rep. 819.

Mitchell vs. Smale, 140 U. S. 406, a companion case to the Hardin case was decided at the same time by this court. The case is rather illuminating on problems such as the so-called Graves Ridge in the case at bar. The court among other things, stated:

> The difference between this case and that of *Hardin vs. Jordan* is supposed to arise from the fact that the strip or tongue of land running into the lake from the north side beyond the meander line (as mentioned in *Hardin vs. Jordan*) was immediately in front of the fractional quarter section belonging to the plaintiff. . . . . .
>
> Our general views with regard to the effect of patents for lands around the margin of a non-navigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the preceding case of Hardin v. Jordan, and need

not be repeated here. We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. . . . . The pretence from making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow.

This expression by this court in the Mitchell vs. Smale case, though peculiarly pertinent to states

which allow reliction, even though it may go to the center of the lake as do many states, including Illinois, must be considered highly applicable in Oregon, by its decisions and the statutes pleaded in the Amended Answer recognize relictions, if any, which had accrued up to the time its legislation went into effect, which effective dates are stated in the Special Master's Report, p. 55. In otherwords, the right to reliction to a certain date is recognized; whether the right of access is such a rested riparian right that it exists unimpaired by the Oregon statutes is a question not involved herein, but one for the Oregon courts to determine, and it is subject to the saving clause of Sec. 4, Chapter 280, General Laws of Oregon, 1921. (See Supplement to Report, p. ix).

In the Kean vs. Calumet Canal & Improvement Company case the question arose on the Indiana side of the state line of the identical lakes involved in Hardin vs. Jordan. The State of Indiana acquired title to the lands bordering on the meander line established by the 1834 survey under the Swamp Land Act; the Calumet Company acquired title through conveyances from the State. Kean asserted title through patents issued by the United States pursuant to the 1875 Wolcott survey.

This Court said:

> On general principles of conveyancing the State would have acquired the land in controversy here by a conveyance from the United States describing the upland according to the survey, because the local law of Indiana and the common law as understood by this court are the same, so far as this case is concerned.

Mr. Justice White made a valiant effort to induce this Court to hold the patents under the Wolcott

Survey were valid and that the United States had a right to survey the bed as it did through Wolcott in 1875 and that it retained the bed and had the right to patent the same as it tried to do, one of such patentees being Kean or his predecessor by mesne conveyance.

The facts of the case are quite fully set forth in the dissenting opinion. He very ably tried to convince his associates that even though under the Common law title to the center of a lake passed to the grantee still under the practice of the land department and the construction of the courts prior to Hardin vs. Jordan that the title to the bed of a meandered non-navigable lake remained in the United States, and that the bed could be surveyed and subsequently patented, and that prior patents by the government to the upland did not prevent the United States from subsequently conveying the bed. He made an exhaustive presentation to the effect that whether the title to the bed had passed by virtue of the prior patents to the upland must be determined by the laws of the United States and not by the law of the state in which the land lay, seeking to invoke the well-settled rule that the construction of United States grants must be according to Federal and not State law, and that this rule must be applied in determining the effect of the grants as to lake bed lands fronting uplands granted. He made a determined effort to induce the Court to apply the rule that the establishment of meander lines does not affect *any question* of the title to the beds, recalling to the court the power of the government to make corrective surveys; he assembled data on what he conceived to be the practice of the land department in surveying

and granting the beds of meandered lakes which had become dry.

He forcibly presented the view that the decision in Hardin vs. Jordan was erroneous, that to follow it would affect the rights of patentees whose patents had been issued prior to that decision, and it would do more harm to perpetrate the erroneous doctrine than to overrule it, and that the rule of stare decisis should not be invoked, and the court should rule in favor of the Wolcott survey and to the effect that the government retained the title in spite of the survey and meander of 1834 and its patents under said survey of 1875 were valid.

But the majority of the Court refused to be swayed by the powerful dissenting opinion of Mr. Justice White. As to certain of his arguments they were content to let the answer stand which was made by the court in Mitchell vs. Smale, 140 U. S. 406, 35 L. Ed. 442, 11 Sup. Ct. Rep. 819, involving lands on the Illinois side of the same lake, above quoted.

The majority opinion of the court conceded the contention of Mr. Justice White with reference to the effect of meander lines stating:

> The making of a meander line has no certain significance. . . . . It does not necessarily import that the tract on the other side of it is not surveyed or will not pass by a conveyance of the upland shown by the plat to border on the lake. It is not always a boundary. . . . . In this case its immediate import was only to indicate the contour of the lake. It would seem, to be sure, that the settled understanding of the land department has been that in cases like the present the meander line marked the limit of the

grant. But probably the cases are comparatively rare in which that understanding was acted on by an attempt subsequently to convey the land under water on the further side of the line at dates before the transactions with which we have to deal.

> The title to such land was not considered of much importance in the early days or worth the trouble of an independent survey. . . . . The United States was more anxious for settlers than for revenue from that source. It is not necessary to consider how we should decide the case with our present light if the question were a new one. It is not new. For twelve years the decisions in Hardin v. Jordan and Mitchell vs. Smale have stood as authoritative declarations of the law. Probably in most cases the statute of limitations has cured the defects of title which those cases may have shown. Meantime many titles must have passed on the faith of those decisions. *The United States can meet them by the form of its conveyances.* It seems to us that it would be likely to do more harm than good to allow them to be called in question now.

The court held Indiana got a title, and gave one to Kean and said:

> The resurvey by the United States in 1874 does not affect the Calumet Company's rights. As the United States already had conveyed the lands, it has no jurisdiction to intermeddle with them in the form of a second survey.

After the decision in Hardin vs. Jordan the Supreme Court of that state held that the common law as stated by this Court to the effect that the upland owner owns to the center of a non-navigable lake had not been adopted in Illinois, and this Court had

erred in assuming so in Hardin vs. Jordan and Mitchell vs. Smale. That the upland owners title stopped at the water's edge and the bed of the lake was in the State of Illinois. Fuller vs. Shedd and Hammond vs. Shepherd, supra. These cases culminated in Hardin vs. Shedd decided by this Court. See analysis of these Illinois cases by the Master in his Report, pp. 40-41.

The facts of Hardin vs. Shedd are given by the Master in his Report (pp. 41-42) and need no repetition here. One additional pertinent fact not given is that though the State of Illinois claimed the beds of non-navigable meandered lakes its law permitted the state to be divested of such title and the upland owner to acquire it in the event the lake dried up, and the law of reliction was held to be applicable. Wolfe lake dried up largely.

This court after making the pronouncement quoted by the Special Master on page 43 of his Report, said:

> "The law of Illinois has been settled since Hardin vs. Jordan, 140 U. S. 371, and it is now clear by the decision in this case and later, that conveyances of the upland do not carry adjoining land below the water line."

The court held Mrs. Hardin got certain rights to the bed of the lake because the drying up of Wolfe lake had added certain lands to her shore ownership under reliction; and Shedd got certain lands because they were above water at the 1834 survey and lands added by reliction thereto. The patentees under the Wolcott survey not having prosecuted error, this court did not pass upon their rights directly; but we submit the result of the decision was that inasmuch as Mrs. Hardin got so much of the bed of Wolf lake as had become uncovered by the

permanent recession of the waters under the doctrine of reliction, that necessarily, meant at least that the patents under the Wolcott survey of 1875 gave nothing; but the court applied the rule that the plaintiff must prevail upon the strength of her own title and gave her title to the bed uncovered by the drying up of the lake, though under the Illinois decisions, this court recognized that she got nothing below low water mark in the absence of such reliction. Surely this court did not err in a series of cases which pointed out that a plaintiff must recover on the strength of her own title and give title to the plaintiff by affirming the judgment below, which affirmance meant that the patentees to the bed of Wolf Lake under the 1874 survey and patents issued pursuant thereto secured nothing. If the United States retained title to the bed of Wolf lake a non navigable lake, the time arrived for this court to say so. But it refused to hold that Mrs. Hardin did not get title but gave her a title, and how could she get a title if the United States owned the bed? What did this court mean in Hardin vs. Shedd when it said:

> "Nevertheless it has become established almost without argument *that in the former case* (i. e. where land is conveyed bounded on a non-navigable lake) as in the latter (i. e. where land is conveyed bounded on a navigable lake) *the effect of the grant on the title to adjoining submerged land will be determined by the law of the State where the land lies.* In the case of land bounded on a *non-navigable lake* the *United States assumes* the position of a *private owner subject to the general law of the State* so far as its *conveyances are concerned.*"?

If this is not a positive declaration by this court

that the *effect of a grant bounded by non-navigable water* is *determined by local* and not by federal law, we do not know what language means, and this is exactly what all the courts have taken the language of this court to mean. What then becomes of the government's argument herein and of the Special Master's opinion that Oregon's legislation *ex proprio vigore* seeks to take from this court the power to construe federal grants and to divest the United States of lands vested in it? (Report, pp. 55-61; Defendant's Exceptions 122-128).

Hardin vs. Jordan was not misunderstood. (Report, p. 39). We have a right to assume that Mr. Justice White who wrote the powerful dissenting opinion in the Kean vs. Calumet Canal & Improvement Company case, really understood what the effect of the decision in Hardin vs. Shedd was; in this case he said:

> "Now, in Kean v. Calumet Canal & Improvement Company, ante, p. 452, quite recently decided by this court, the doctrine announced in Hardin v. Jordan was re-examined, and it was in effect held that that case whilst recognizing that the ownership of the *bed of non-navigable lakes on the public domain was in the United States, simply decided that when the United States sold lots bordering on such a lake the question whether or not the bed of the lake passed by the grant of the border lots was to be determined by the principles of conveyancing in force under the local law of the State where the lake was situated.*"

That the case of Hardin vs. Shedd conclusively settled the question that where the government has granted away the uplands without reservations or re-

strictions in the grants, it is within the province of a state to declare *title* to the bed of a *non navigable lake* to be *in itself* instead of the riparian owner is apparent from the following statement in Justice White's dissenting opinion:

> "I content myself with merely stating this view, which involves the merits, and do not elaborate, because in my opinion, if it be—*as the court now decides*—that the question whether the *title of the United States to the bed of Wolf Lake passed to the State of Illinois is to be determined solely by the local law of Illinois, as construed by the courts of that State*," (190 U. S. 524)

then he says that no Federal question was presented and the case should not be reviewed by the supreme court, the same contention he unsuccessfully made in the Kean case.

The consideration referred to in Hardin vs. Shedd, 190 U. S. 508, 520, that the plat of Wolf Lake in Illinois had the words "navigable lake" thereon, has been since adjudicated by this court of no importance; this court has said that no legal inferences of navigability arise from acts of surveying officers or their declarations. Oklahoma vs. Texas, 258 U. S. 574, 585. This court said that surveying officers were not clothed with power to settle questions of navigability. Id. Hence neither declarations by the surveyors that bodies of water are navigable, or non navigable, or constitute marshes or vast swamps only have any binding effect upon government or state.

The cases of Whitaker vs. McBride, 197 U. S. 510 and Marshall Dental Co. vs. Iowa, 226 U. S. 460, referred to by the Special Master in his Report, pp. 44-48, and what was said by this court in these cases, undoubtedly caused the Master to

feel that this court had not passed upon the question of the title to the bed of a non-navigable lake where the riparian owner's title stops at the water's edge. It will be noted that in the Whitaker vs. McBride case the *state court* took pains to reserve the question of the right of the state. This court did likewise as to the rights of the United States and expressly stated that they did not pass upon that question, the court using this phrase, "Upon that question we express no opinion." In the Marshall Dental Co. vs. Iowa the state court did not attempt to assert ownership under state law in the state and accordingly, the state court not having passed upon the question, this court did not find it necessary to declare the local law. The court stated only:

> "It follows that the bed of the lake either still belongs to the United States *or must be held to have passed to the state.* The question to the title to the bed is treated as open in Hardin vs. Shedd, 190 U. S. 508, 519 and Whittaker vs. McBride, 197 U. S. 510, 515, and there is no need to decide it now. It is enough to say that by *virtue of its sovereignty the State of Iowa* has an interest in the condition of the lake sufficient to enable it to maintain this suit against an intruder without title, whether the state owns the bed or not."

The decision in the Marshall Dental case was on January 6, 1913. On January 7, 1913, this court rendered its decision in Donnelly vs. United States to which we have elsewhere called the court's attention. If it can be urged after this decision that the question of the bed of a non-navigable lake where the upland has been patented and the grantee's title only goes to the water's edge is left open we claim that the rule

of law was finally settled in Wear vs. Kansas, 245 U. S. 154 and in Brewer Elliott Oil & Gas Co. vs. United States, 260 U. S. 77.

Effects of Patents and Grants Without Reservations or Restrictions

It is clear from the foregoing cases that unless the United States in some *affirmative manner* has *reserved* title itself to the beds of lakes which are non-navigable under the Federal criterion but are navigable under the state interpretation, in other words, navigable under state law but are not navigable under federal laws, or even non-navigable under both state and federal rules, that the title to the beds of such bodies is determined in accordance with the law of the several states. The question of the title of such a body of land is a question of interpretation of state law and not of federal law, and does not even raise a federal question. This makes clear the statement of this court in the case of United States vs. Cress, 243 U. S. 316, 319, 61 L. Ed. 749, 37 Sup. Ct. Rep. 381, in the effect that

> "the states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, *both navigable* and *non-navigable*, and the ownership of the lands forming their beds and banks."

The case of Oklahoma vs. Texas 258 U. S. 574, 66 L. Ed. 771, 42 Sup. Ct. Rep. 406, involved a controversy over the boundary along the course of the Red River. Oklahoma claimed the bed of the river as did Texas, and the United States also intervened and disputed the claims of both states asserting proprietorship of the southerly half and an interest because of

its relation to Indian allottees in portions of the northerly half. The court found that the boundary between Oklahoma and Texas was along the south bank of the river and not along its medial line and that accordingly the entire river bed was within the State of Oklahoma and beyond the reach or jurisdiction of the laws of the State of Texas. Oklahoma claimed complete ownership upon the ground that the Red River was navigable and inured to the State of Oklahoma upon its admission into the Union. The Court found that the Red River was non-navigable under the doctrine of this court that navigability in fact is a test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used or is susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. (Citing cases.) The court referred to a decision of the Supreme Court of Oklahoma in Hale vs. Record, 44 Okla. 803, 146 Pac. 587. The court called attention to the fact that in that case the opinion was briefly to the effect that in the trial court the evidence was conflicting, that the conflict was there resolved on the side of navigability, and the state court said that this finding had reasonable support in the evidence and therefore could not be disturbed. This court (258 U. S. 591, 66 L. Ed. 778, 42 Sup. Ct. Rep. 413) said:

> "It was a purely private litigation. The United States was not a party and is not bound." (citing Economy Light & Power Company vs. U. S. 256 U. S. 113, 123, 65 L. Ed. 847, 854, 41 Sup. Ct. Rep. 409.)

The court having found on the facts that within Oklahoma the river was not navigable, therefore the title did not inure to the state upon its admission into the Union, and if it had any title to the bed it was only such as may be incidental to its ownership of riparian lands on the northerly bank, and this was likewise true as to the grantees and licensees of the state. It appeared in the case that by an act of June 6, 1900 and a subsequent act enacted June 5, 1906, lands involved known as the Big Pasture, had been set aside to the mid channel of the river for certain tribes of Indians. This court examined the facts and found that under the treaty reservation with the Indians the Big Pasture and the acts of 1900 and 1906 the United States intended to dispose of the upland and the northerly half of the river bed but nothing more, and that the United States had retained to itself the title to the bed of the southerly half of the river. The case turned upon the construction of the terms of a grant made before statehood and this was held to be a Federal question.

This court said:

> "Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it of course is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what is intended. If by a *treaty* or *statute* or *the terms of its patent* it has shown that it intends to restrict the conveyance to the upland or to that and part only of the river bed that intention will be controlling; . . . . and if its intention be *not otherwise shown it will be taken to have assented that its conveyance should be construed*

and given effect in this particular according to the law of the state in which the land lies." Citing cases.

We respectfully submit that the statement of this court just quoted (258 U. S. 594, 595, 66 L. Ed. 780, 42 Sup. Ct. Rep. 414) and in support of which this court cites Hardin vs. Jordan, Hardin vs. Shedd and other cases, though made with reference to a non-navigable river yet is equally applicable to a *lake* which may be construed to be non-navigable. In this case there is no treaty or statute showing any intention to restrict the conveyance to the upland or to that and a part only of the lake bed. None of the patents have any terms contained therein showing a retention by the government of all or any part of the lake bed and accordingly, this being true, to paraphrase the language of this court in Oklahoma vs. Texas, the government's "intention not being otherwise shown it will be taken to have assented that its conveyances shall be construed and given effect in this particular according to the law of the state in which the land lies," in this case the State of Oregon. Under this decision it is clear that the statutes quoted in the Amended Answer of the State of Oregon filed herein being the latest expression of the state and not inconsistent with any state decision but as a matter of fact consistent with the decision of the Supreme Court in Cawlfield vs. Smith are valid, and under that case and these statutes, the title to the beds of the lakes involved herein, not having been reserved by the government in its patents, is in the State of Oregon, and the law of the State of Oregon must be given final and full effect herein.

At this point we call the court's attention to its

language in Brewer-Elliott Oil & Gas Co. vs. U. S., 260 U. S. 77, 87, 67 L. Ed. 140, 146, wherein this court in considering the navigability of the Arkansas river in Oklahoma held that in that case it was not a local question for the state court to decide as in State vs. Nolegs, 40 Okla. 479, 139 Pac. 943, and Hale vs. Record, 44 Okla. 803, 146 Pac. 587, for the reason that the *grant involved* in that case to the river bed was in 1872, 35 *years before Oklahoma was admitted into the Union* and before there were any state tribunals to decide the question, and this court held that as to such a grant made before statehood the judgment of the state court on the question of navigability of the Arkansas river did not bind the Supreme Court for there was involved the validity and effect of an act done by the United States before statehood and it was necessarily a federal question and that the title of the Indians there involved grew out of such a federal grant before statehood when the federal government had complete sovereignty over the territory in question and therefore if the river was non-navigable in the federal sense and if the bed thereby under such grant before statehood became the property of the Indians the admission of Oklahoma into the Union on a constitutional equality of power with other states did not divest the title. This court said:

> "It is not for a state by courts or legislature in dealing with the general subject of beds of streams to adopt a *retroactive rule* for determining navigability which would destroy a *title already accrued* under federal law and grant, or would enlarge what actually passed to the state at the time of her admission under the constitutional rule of equality herein invoked."

In the light of the foregoing discussion we wish to

quote the language of this Court in Brewer-Elliott Gas & Oil Company vs. U. S., 260 U. S. 77, 88, 67 L. Ed. 140, 146, 43 Sup. Ct. Rep. 64, 65. This court said:

> "Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If, by a *treaty* or *statute* or the *terms of its patent*, it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. When it is disposing of tribal land of the Indians under its guardianship, the same rules apply.
>
> "In government patents *containing no words shownig a purpose to define riparian rights*, the intention to abide the state law is inferred. Mr. Justice Bradley, speaking for the court in Hardin v. Jordan, 140 U. S. 371, 384, 35 L. Ed. 428, 434, 11 Sup. Ct. Rep. 808, said:
>
> "'In our judgment, the *grants* of the government for lands bounded on streams and other waters, *without any reservation or restriction of terms*, are to be construed as to their effect according to the law of the state in which the lands lie.'
>
> "Some states have sought to retain title to the beds of streams by *recognizing them as navigable when they are not actually so*. It seems to be a *convenient method of preserving their control. No one can object* to it unless it is sought thereby to *conclude* one whose right to the *bed of the*

river, granted and vesting before statehood, depends for its validity on non-navigability of the stream in fact. In such a case, navigability vel non is not a local question. In Wear v. Kansas, 245 U. S. 154, 62 L. Ed 214, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586, upon which the appellants rely, the patent of the United States under which Wear derived title was a grant, made before statehood, to land bordering on the Kansas river, without restriction, reservation or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on a navigable stream did not convey the bed of the river. *The United States, by it unrestricted patent, was properly taken to have assented to its construction according to the local law.* Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a non-navigable stream, was immaterial. In either view the result would have been the same. The case of Donnelly v. United States, 228 U. S. 243, 57 L. ed. 820, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913 E. 710, is to be similarly distinguished, if, indeed, it can be said, after the qualification of the opinion (228 U. S. 708, 711, 57 L. Ed. 1035, 1038, 33 Sup. Ct. Rep. 1024, Ann. Cas. 1913E, 721), to require distinguishing."

Hence where the Federal Government has not expressly reserved title within the meander lines of a properly meandered body of water, the result is the same whether that body of water be construed to be navigable or public waters within the state rule. The title to such areas under water must be determined in accordance with the law of the state in which such body of water and the beds thereunder are situated.

Is there any other meaning to be attributed to the following language of this court in Wear vs. Kansas, 245 U. S. 154, 158, 62 L. Ed. 214, 218, 38 Sup. Ct. Rep. 55, 56:

> "If a state court takes upon itself to know without evidence whether the principal river of the State is navigable at the capital of the state, we certainly cannot pronounce it error. In this respect it is a question of state law." Citing the Donnelly case, supra.

In the Holt State Bank case the question was squarely presented to this Court whether Mud Lake was a navigable body of water when Minnesota was admitted into the Union. *There was not presented to the Court for determination* (a) *the question as to who owned the bed of a non-navigable lake which had been meandered by the government and the uplands bordering the meander line sold and disposed of by the government by unrestricted patents containing no reservation to lands within the meander line or otherwise, and there was not presented to the court for decision* (b) *what is the ownership of the bed of a non-navigable lake which had not been granted away prior to statehood, and there was not presented for decision* (c) *the question of what is a navigable lake of a state as contra-distinguished from a navigable body of water of the United States in the light of such patents without any reservations therein.*

An exhaustive examination by us of all subsequent Federal decisions, both in the lower Federal Courts and in this court, and in a multitude of state courts, convinces us that there is no expression to be found in any decision showing that the rule announced by this court in Hardin vs. Jordan, did not

finally set forth the law, and accordingly we confidently assert that when the Government meanders a non-navigable lake and issues patents to the upland owner of any portion thereof above the meander line, without any reservation being set forth in the grant reserving to the Government any right, title, interest or estate within the meander lines, that the Government conclusively consents that the effect of its patents and grants shall be such as the state in which such lake is situated shall declare, either by legislation or judicial decision. If the state declares the riparian owner owns to the center of the lake, the effect of a patent to lands upon the meander, will be to give such riparian owner title to the center of the lake to be apportioned between them possibly in the method described in Hardin vs. Jordan. If the law of the state is that the riparian owner only owns to high-water mark, such will be the interpretation given to the patent. If the state holds that the owner owns to low-water mark, he will have such title under state law. The question of riparian right and the question of his ownership of the beds beneath the waters is entirely for the state to determine. In any event, the title to the bed of the lake has been abandoned by the government and it has conclusively agreed that the title shall be determined in accordance with the laws of the state. If by state law the title to the bed is neither in the riparian owner to the center of the lake nor to high-water mark nor to low-water mark, but the state desires to impress the doctrine of state navigable waters namely public waters over the bed of such lake and to treat the title to the bed of the lake as in the state, then this court will give such effect to its patents. If the United States,

in making patents and grants to the uplands bordering on a meander line, desires to retain any riparian title below the meander line other than that which is given by the state law, or if it desires to retain title to the bed of the lake, then it is the duty of the Land Department to insert in its patents or grants, a reservation or restriction, retaining to the Government such title within the meander line. If the Government makes no such reservation or restriction, the State law as this Court has decided and the General Land Office has said must conclusively control.

The government if it desires to retain the beds of non-navigable lakes can do so as stated in Kean vs. Calumet, supra (190 U. S. 460: "The United States can meet them by the *form of its conveyances.*"

We deem it to be an absurd contention to interpret the decisions of this court to mean that if a non-navigable lake is meandered and the upland sold by patents and grants, without restrictions or reservations, that the riparian owner or grantee in such grants and patents, may acquire as a riparian right title to the land within the meander line if the court of the particular state so decides, but that it is beyond the power of the sovereign states or its courts to say, in any state, "No, we will not give the riparian owner title below meander line or to lake bed lands, but we will assert and retain title to the beds of such public waters in the State because we believe that this asset should be preserved to the state for its future generations. We believe that the uses of these waters for fishing, hunting, fowling, rowing, skating, and other public uses are of as much economic importance to people driven for six days in the week and three hundred twelve days in the year by busi-

ness pressure and who find health, mental saneness and relaxation on these lakes on Sundays and holidays, as any argument founded on a commercial basis; the federal rule giving Congress authority over navigable waters, under the commerce clause, does not (as to other waters) spell the limit of human happiness; that reasoning does not bind the public policy of a state as to navigable waters of the state in contradistinction to navigable waters of the United States, and the state has the power to preserve its lake bed lands in public ownership if it desires."

Although in Oklahoma vs. Texas, 258 U. S. 574, 66 L. Ed. 771, 42 Sup. Ct. Rep. 406, involving the Red River and Brewer-Elliott Oil & Gas Co. vs. U. S., 260 U. S. 77, 87, 67 L. Ed. 140, 147, 43 Sup. Ct. Rep. 60, involving the Arkansas River, decided as to the particular lands involved therein, and because of the facts therein stated, it was necessary to determine whether said rivers were navigable streams within the Federal rule, (and those decisions are entirely unimpeachable,) yet we respectfully suggest that those very decisions establish that except as to lands alienated before statehood of the states involved, as to all other lands underneath the bed of these streams, at least where the uplands have been unreservedly patented, it was competent for the local state to declare such streams navigable and to determine the title of the bed thereunder with reference to such state rule of navigability and that, except as to the lands described or coming within the category of the lands involved in Oklahoma vs. Texas and Brewer-Elliott Oil & Gas Co. vs. United States, that the cases of Dana vs. Hurst, 86 Kan. 947, 122 Pac. 1041, and State vs Nolegs,

40 Okla. 479, 139 Pac. 943, correctly held the title underneath the beds of said streams determined by the laws of the respective states within which they were located, and we confidently assert that unless the government had conveyed away such lands before statehood, or unless the government in patenting the upland had inserted restrictions or reservations in the patents and grants, that the title to the beds of such lakes and streams, and the riparian rights, if any, are to be determined in accordance with the laws of such respective states.

The United States lost all interest and title when Oregon was admitted to the Union if the lakes are navigable in the Federal sense, (except powers with reference to navigation under the commerce clause); the United States lost all interest and title in the lakes if they are non-navigable in the Federal sense when the government issued unrestricted grants to practically all the uplands bordering on the meander line of each lake. Then the legislation of Oregon comes into play, and as said in Wear vs. Kansas, 245 U. S. 154, 158, 62 L. Ed. 214, 218, 33S, 33 Sup. Ct. Rep. 55, 56:

> "If a state court takes upon itself to know without evidence whether the principal river of the State *is navigable* at the capital of the state, we certainly cannot pronounce it error. In this respect, it is a question of state law."

To paraphrase this, if Oregon takes upon itself to know that Mud Lake and the Narrows are navigable, the government having patented all of the lands upon the shores thereof and takes upon itself to know that all of that part of Malheur Lake facing the uplands which have been granted and patented

are navigable, and similarly those portions facing the patented lands of the Sand Reef Division and Harney Lake are navigable, the Supreme Court of the United States cannot pronounce it error. In this respect it is a question of state law. If the government had issued patents or grants with reservations of the beds of the lakes therein contained we would have another question to decide. But the patents and grants were all since statehood and are without restrictions.

In Harrison vs. Fite, 148 Fed. 782, 783, 78 C. C. A. (8) 447, 449, a Federal case which has been referred to a great many times by the courts and which is also cited on other points by the Special Master in his Report, the court stated:

> "The shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the states respectively; and the new states upon their admission to the union have the same rights in respect thereof as the original states. As to *lands bounded on unnavigable waters the United States assumes the position of a private owner subject to the general law of the state so far as its conveyances are concerned. In either case* the question whether the title to the soil under the waters passes to the grantee of the shore land *is determined by the law of the state where the land lies.*"

The case of Shore vs. Shell Petroleum Corporation, 55 Fed. (2nd) 696 involved the question of the ownership of the bed of the Arkansas River contiguous to certain upland owned by the plaintiff Shore who acquired title to such upland by mesne conveyances from persons to whom the land had been patented by the United States in 1872. Kansas, the state in

which the lands were located was admitted on January 29, 1861. Some of the plaintiffs were also successors in title to the State to certain lands in Section 36 acquired by the state as School lands. The defendant Shell Petroleum Company claimed under leases from the State of Kansas to the river bed, the State claiming ownership of the bed as the bed of a navigable stream. Shore also claimed certain rights under Indian grants but such title was not sustained. Neither the United States nor the State were parties. The plaintiff claimed the river was not navigable. The river was meandered.

The District Court ruled in favor of the defendant. The opinion is long and contains an excellent discussion of the whole subject matter, and we ask the court to examine it carefully. The Court tries to guard itself due to the fact that the United States was not a party, probably remembering the sad experience of Judge Sanborn in the Holt State Bank case. A few excerpts from the case will be given.

> Therefore, under the facts of this case there is no question as to whether the Arkansas river is navigable in fact. The question is whether it is a navigable one under the local law of the state of Kansas.

The court cites Jackson-Walker Co. vs. Hodges, see, infra.

Justice Hopkins then quotes Chief Justice Taft's statement in the Brewer-Elliott Oil & Gas Co. case, quoting verbatim therefrom the exact language set forth in this brief, supra, and continues:

> "And, as stated by Mr. Justice Holmes in Wear v. Kansas, supra: 'If a State Court takes upon itself to know without evidence whether the principal river of the State is navigable at the capital

of the State we certainly cannot pronounce it error. In this aspect it is a question of State law. . . . . The fact is of a kind that should be established once for all, not perpetually retried.'

Since the United States is not a party to these actions, and since *all rights here involved have vested subsequent to statehood*, this court is bound by the local law of the state of Kansas.

Consequently, the patentees (grantors of plaintiffs) took title subject to the laws of the state of Kansas. Wear v. Kansas, 245 U. S. 154, 38 S. Ct. 55, 62 L. Ed. 214. The Brewer-Elliott Oil & Gas Co. decision is based upon entirely different facts and is not applicable.

I am of the opinion that the Osage 'Strip' became a part of the state of Kansas upon the admission of Kansas to the Union. . . . . And thus, if the Arkansas river was navigable under Kansas law, the State of Kansas acquired title to the river bed. In any event, if this land did not belong to Kansas before or at statehood, it became such when the Osages relinquished their rights in 1870, two years or more prior to the issuance of the *patents through which plaintiffs* claim.

In Brewer-Elliott Oil & Gas Co. case, the rights of the Indians (who still held title) was a *fee-simple title granted before statehood and specifically granting title to the center of the river.* Here, the rights of the plaintiffs *vester after statehood*, and the *patents are silent* as to the extent of the grants adjoining the river. *In this situation the grant of the patent is presumed to have been made with the assent of the United States that the same shall be construed according to local law. Under local law title to the river bed is in the state, and therefore the patents did not cover the river bed.*

The Court then quotes from Oklahoma vs. Texas

the excerpt set forth in the Special Master's Report herein, p. 38-39, and continues:

> In Dana v. Hurst, 86 Kan. 947, 122 P. 1041, decided 1911, the court took judicial notice of the fact and decided that the Arkansas river in the state of Kansas, before Kansas became a state and continuing thereafter, has been and is a navigable river; that the title to the bed of said river had become and remained vested in the state of Kansas. That decision has been adhered to by the Supreme Court of Kansas in various cases since.
>
> The state has otherwise given an operative interpretation to this public policy. For instance, she sold many islands or accreted lands located in the Arkansas river and has delivered patents and possession of the same to the vendees or their assignees. The islands or accreted lands thus sold located in the counties of Kearny, Finney, Gray, Ford, Edwards, Pawnee, Barton, Rice, Reno, and Sedgwick. This at intervals from 1912 to 1928.
>
> The state has also issued licenses to various persons or corporations to remove sand and gravel from the bed of the Arkansas river in Kansas, in conformity with which sand and gravel have been removed from the Arkansas river.
>
> What was said by Justice Dawson in his dissenting opinion in Webb v. Board of Com'rs of Neosho County, 124 Kan. 38, 257 P. 966, 969, may well be adopted here:
>
> 'It has repeatedly been held that the Kansas and the Arkansas rivers are navigable. How were the facts ascertained in those cases? By testimony of witnesses? Certainly not The court took judicial notice of the facts, and the federal Supreme Court said that was quite a proper exercise of judicial power. Wear v. Kansas, 245 U. S. 154, 38 S. Ct. 55, 62 L. Ed. 214, Ann. Cas. 1918B, 586. And it was quite well that the court did so, especially in the

case of the Arkansas river, for, if the navigability of that stream had been left to the testimony of witnesses and the findings of the jury, supplemented by a court view of the river itself, the public rights in that stream bed would inevitably have been sacrificed. Touching the Arkansas river, also, scientists have noted that its former volume of water has greatly diminished within living memory. See J. R. Meade's article, "A Dying River," in volume 14, Transactions, Kansas Academy of Science, 111, 112. But the title to the stream bed, never having been conveyed to private ownership, remains in the state for the public benefit. Dana v. Hurst, supra.

'Some courts have come to realize that the debatable fact of navigability is a very unsatisfactory determinant of the title to the bed of a stream. In Thompson's Title to Real Property, 127 (Bobbs-Merrill, 1919) it is said: "A division of waters into public and private waters has been adopted in some recent decisions, and undoubtedly the tendency is to extend and assert public rights against private ownership in lakes and rivers, without much regard to any test or definition of navigability." (Correct citation is Vol. 4 Section 3229.)

'And, since navigation of public streams in Kansas is virtually nonexistent, the further away we get from the times and customs of the historic voyageurs, explorers, and trappers, and their primitive waterborne commerce, the sooner this court abandons all discussion of navigability as a test of title to Kansas river beds the better. The test of navigability is merely an academic stumbling block which needs be gotten rid of. Let us use the more accurate terms of *public streams* and *private streams*. If a riparian owner can show title deraigned from the United States or the state of Kansas, the stream bed is his private

property . . . If he cannot—if it cannot be shown that the federal or state governments has parted with the title thereto—the stream is a public stream, and the bed of that stream is public property.

'Let it be understood that ordinarily the terms "public stream" and "navigable stream" are interchangeable terms. I advocate no change in substantive law. I merely urge the adoption of a more precise and less misleading terminology. Let us say that, where the title to a stream bed has never been conveyed by the state or federal government, this court prefers to designate it as a public stream rather than as a navigable stream, so that every time a question arises touching the navigability of a Kansas stream it will not be necessary to open a judicial kindergarten to teach the history and geography of the American wilderness and the pertinent statutory and other changes in the common law of inland waterways and riparian rights which the new conditions of the wilderness required.

'To the suggestion that private property rights might be affected by such a pronouncement, I reply that, no matter what may have been said in private litigation touching the extent of ownership vested in the riparian owners of meandered streams, the public right therein was never a major issue in any such lawsuits; and certainly the public right could not be foreclosed in any litigation to which the state's responsible representatives were not a party. . . . Of course, wherever a riparian owner can show a valid grant from the state to a stream bed, an island, a sand bar, or the right to bridge or dam a public stream, his property right will be protected.'

The Circuit Court of Appeals said that inasmuch as the appellant claimed the river was non-navigable,

it refuted any theory that the United States was interested. 60 Fed. (2nd) 1.

The court quotes from United States vs. Cress as elsewhere set forth in this brief, and from Brewer-Elliott Oil & Gas Co. vs. United States after noting:

> No reference is made in any of the patents to the river of its bed,—nothing whatever indicating expressly or impliedly an intention of the United States or the state to convey any part of the river bed.

The court then quotes from the Kansas cases which ruled the Arkansas river to be navigable and concluded as follows:

> "'But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several states.'
>
> "See also, Jackson-Walker Coal & Material Co. v. Hodges (D. C.) 283 F. 457. So we apply in this case the rule of property established by the supreme Court of Kansas."

In Jackson-Walker Coal and Material Company vs. Hodges, 283 Fed. 457, 486, the District Court stated:

> "While from a consideration of the proofs taken and submitted in this case and from that general knowledge common to all men, there can be no possible doubt whatever the Arkansas river at the point in controversy in this case, is not now and has not since its known history, been navigable in point of fact; that is to say the stream in its ordinary condition does not afford a channel for useful commerce, hence it is not navigable within the meaning of Acts of Congress on that subject . . . . . however from what has gone before, it must I think, be held in

> this case, the navigability of the stream in point of fact is not the true test. On the contrary, the true test is whether the Arkansas river at the locus in quo must be regarded as navigable under the local laws of the State of Kansas as ordained and established for the purpose of the unvarying determination of the property rights of riparian owners along its course through the state. That by the local property rule established in this state once for all, the title to the bed of the Arkansas river within the state is vested in the state and not in the adjoining riparian owner." P. 464.

We respectfully submit that though the United States had intervened in the case of Shore vs. Shell Petroleum Corporation or had been a party thereto as it was a party in the Brewer-Elliott Oil & Gas Co. case or Oklahoma vs. Texas, that the rules announced in the last two cases would have been applied, namely the United States itself must submit to the rules of law as to lands under waters lying within a state unless the United States has, before statehood by grant or treaty attempted to convey or reserve the fee to the uplands or a portion of the bed, in which cases the effect of its treaty or grant becomes a federal question and the question of navigability under the federal rules becomes important, or unless the government, after statehood, by reservations or restrictions in terms in its grants seeks to retain title to the beds of non-navigable waters. As to navigable waters there is no question. Unless there is a treaty or a grant before statehood or a restriction or a reservation in the patent subsequent to statehood the government must submit to the construction of the state. Any other interpretation of the decisions of this court is impos-

sible. The titles to lands are vested or not vested. The question should not be perpetually re-tried. In the event of treaty, grant or patent before statehood or reservations or restrictions in patents after statehood then the question of navigability under federal rules becomes important. Where there are no such treaties or grants before statehood or reservations in patents after statehood the United States conclusively consents to be bound by state laws. As indicated in the Brewer-Elliott case and in Oklahoma vs. Texas, the government construed those streams to be non-navigable because there were involved treaties and grants before statehood and the effect thereof had to be determined by federal law and the federal law applied the federal rules as to navigability. This court, as it did in Wear vs. Kansas, must permit a state to declare *waters navigable* and the bed thereof in the state if such is the state law, where the only question involved is the effect of patents and grants made after statehood and without reservations or restrictions of terms. Any other interpretation of the decisions of this court must leave forever unsettled the title to the beds of innumerable rivers and lakes which may be non-navigable in the federal sense for unless the United States sues or intervenes in a suit between private parties the claims of the government are unsettled. It is unthinkable that there should not be some definite rule of law settling the titles to the beds of non-navigable rivers and non-navigable lakes where it is impossible to sue the sovereign United States without its consent. It is not necessary to sue the United States or that it should be a party. This court has conclusively asserted that the United States has no interest unless the effect of a grant before state-

hood or of a treaty before statehood is involved or unless a grant or patent after statehood with proper reservations or restrictions is involved. If there is no treaty or grant before statehood and no reservation or restrictions in terms in patents after statehood, the United States is bound by state law.

We do not believe Hardin vs. Jordan has been misunderstood as indicated by the Special Master (Report, p. 39); and it is indisputable that a vast body of real property law has been built up in the various states of the Union in reliance on what the courts believed and had good reason to believe, was meant by the announcement in that case by this court that:

> "The *grants* of the government for lands bounded on streams and *other* waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie."

We ask this court to note the tremendous effect it would now have on property rights to change this ruling; in the following cases the above rule by this court is quoted and applied and innumerable conveyances of the beds of streams and lakes made in reliance thereon:

Cooley v. Golden, (1893) 117 Mo. 33, 44, 51, 54, 23 S. W. 100, 104, 106, 108.

Craig v. White, (1921) 187 Cal. 489, 492, 202 Pac. 648, 649.

Glasscock v. National Box Co. (1912), 104 Ark 154, 160, 148 S. W. 248, 251.

Kavanagh v. Baird (1928), 241 Mich. 240, 254, 217 N. W. 2, (analysis of trust doctrine) 7.

Mettler v. Ames Realty Co. (1921), 61 Mont. 152, 164, 201 Pac. 702, 705.

Minnie v. Rose (1922), 152 Ark. 527, 530, 238 S. W. 782, 783.

Moore v. Farmer (1900), 156 Mo. 33, 48, 56 S. W. 493, 498.

McBain v. Johnson (1900), 155 Mo. 191, 201, 203, 55 S. W. 1031, 1033, 1034.

Sapp v. Frazier (1899), 51 L. Ann. 1718, 1725, 26 So. 378, 381.

Snyder v. Colorado Gold Dredging Co. (1910), 181 Fed. 62, 69 (C. C. A. 8th Cir.).

Southern Railway Co. v. City of Greenwood (1928), 40 Fed. (2nd) 679, 682.

State v. Akers (1914), 92 Kan. 169, 177, 184, 140 Pac. 637, 640, 643, Ann. Cas. 1916 B, p. 543, s. c. Wear v. Kansas, involving right of state to take sand and gravel from Kansas and Arkansas rivers.

State v. Korrer, 127 Minn. 60, 70, 148 N. W. 617, 621, L. R. A. 1916C, 140.

State v. Rolio (1927), 71 Utah 91, 98. 262 Pac. 987, 990.

State v. Tuesburg Land Co. (1915), 61 Ind. App. 555, 576, 581, 583, 584, 586, 591, 109 N. E. 530, 536, 539-540, 541, containing a very illuminating discussion of Mr. Justice White's dissenting opinion in Kean v. Calumet Co. and majority opinion.

Thiesen v. Gulf, F. & A. R. Co., 75 Fla. 28, 64, 78 So. 491, 502, LRA 1918E, p. 718, 733.

Williamson v. Watts (1923), 309 Ill. 607, 610, 141 N. E. 383, 384.

Attached hereto in the *Supplement* to this brief, marked Appendix F are many more cases which recognize and apply the local law as it has modified the common law and used it so far as they thought it compatible with their conditions. A vast body of real property law has been built up in the nation, and to apply a rule as indicated by the Special Master

would open up the title of every non-navigable lake in the nation, destroy the apparently binding effect of the local decisions, and in every state where title to the riparian owner is not recognized to the center of the lake, give the United States the right to make the same kind of attack on titles as is made in the case at bar. As stated by this court in New York Trust Co. vs. Eisner, 256, U. S. 345, 349, 65 L. Ed. 963, 983:

"A page of history is worth a volume of logic."

If it is conceded, as this court has decided, that the power rests in the legislatures and courts of the respective states to declare what, if any, riparian rights, the owner of the upland secures who holds patented land upon the meander line of non-navigable lakes, we claim this court is irrevocably committed to the doctrine that the legislatures of such states or the courts of such states, in pursuance of advanced judicial or legislative policy, may declare that it is to the highest interest of the state, that the beds of such lakes be retained by the state itself instead of being given to the riparian owner. It would be a remarkable doctrine for this court to hold that it is within the power of states where the government patents lands upon the meander line of a non-navigable stream or lake without restrictions, to determine what, if any, riparian rights the upland owner has and what, if any, title he may secure to the bed under the waters, and to concede the undoubted power of the state to recognize a title in the upland owner either to the center of the lake, to low-water mark or to high-water mark, in accordance with such public policy as the state pronounces, but to declare that the state is powerless to declare that the beds of such lakes belong not

wholly or in part to the upland owners, but shall be preserved for all of the people of the state, and that the state when patents are issued secures the same and becomes the owner thereof if it determines that public policy should so require.

There can be no question that throughout the courts of this country since the case of Hardin vs. Jordan was decided, the several states and the legislatures thereof, have interpreted that decision to mean that the state itself could retain the title to such beds instead of giving them to the upland owners.

Administrative Interpretations of Hardin vs. Jordan, the Shedd and Kean Cases

The Special Master states Hardin vs. Jordan has been misunderstood. What shall we say then, when we find the Department of the Interior giving to Hardin vs. Jordan, and the other cases, the same construction which the state courts have given them. The administrative interpretation of the General Land Office and of the Secretary of the Interior in administering the public lands ought to be very important. And we find that its interpretation is directly opposite to that contended for by Mr. Justice White in his dissenting opinions in Hardin vs. Shedd and Kean vs. Calumet Canal Co. Administrative constructions and opinions are entitled to great weight. Heath vs. Wallace, 138 U. S. 573, 11 Sup. Ct. Rep. 380, 34 L. Ed. 1063, 1067-8.

William Erickson applied to the Commissioner of the General Land Office for a permit to prospect for sodium in the beds of three meandered non-navigable lakes in Montana, a state which had adopted the common law as controlling "wherever not incon-

sistent with the constitutions of said state and the United States and their statutes." (We call attention that this provision is not as restrictive as in Oregon, which we elsewhere discuss under the master's division devoted to the subject of the Common Law of Oregon). Most of the uplands on the lakes had been patented by the United States except that lot 12 of Section 24 and Lot 6 of Section 26, T. 36 N. R. 58 E. M. P. M. Glasgow, Montana, which still remained vacant public land, such as portions on Malheur Lake, on the Sand Reef Division and on Harney Lake in the case at bar. The Secretary of the Interior held that title had passed out of the United States by the patenting of the upland, except to those portions of the beds fronting the vacant unpatented public lands aforesaid and in determining that portion owned by the United States apportioned the bed between the riparian owners and the government in accordance with the rule specified in Hardin v. Jordan. William Erickson, 50 L. D. 281. The Secretary held:

> *It is too well settled to admit of question at this time that patents of public lands abutting upon non-navigable lakes will be construed in accordance with the laws of the State within which the land is located;* that unless a contrary intent is expressed in the patent, the meander line will be regarded as merely indicative of the amount of upland to be paid for by the patentee; and further, that where the common law of England is followed such patentees acquire title, ratably to the lands underlying the non-navigable bodies of water.
>
> As there was *no limitation in the patents* issued for the uplands abutting upon the lakes involved herein it is clear that title has passed to the patentees for all those portions of the beds of said

lakes, *save that which remains in the United States and would pass as appurtenant to the vacant and unappropriated lots before described, upon the issuance of unqualified patents for said lots.*

A prospecting permit issued pursuant to the leasing act of February 25, 1920, supra, would carry with it a riparian right to prospect the appurtenant portion of the lake bed. Clayton Phebus (48 L. D., 128). . . . . .

The foregoing rule seems, upon consideration of the authorities herein cited, to be based upon the *mistaken view* that the law *of the State within which non-navigable lakes* are situated, as to the rights of riparian owners, is binding upon the United States *before it has parted with ownership of the uplands.* That such is not the case clearly appears in the ruling of the Supreme Court in the case of Hardin v. Jordan, supra, that

. . . the *grants* of the Government for lands bounded on streams and other waters, *without any reservation and restriction of terms,* are to be construed as to their effect *according to the law of the State in which the lands lie.* (Italics supplied.)

In a later case in which the same court adhered to the ruling in Mitchell v. Smale and Hardin v. Jordan, supra, the court pointed out, with respect to the effect of said rulings upon grants by the Government *"The United States can meet them by the FORM of its conveyances."* Kean v. Calumet Canal and Improvement Company (190 U. S., 452).

Until the United States has passed titles to riparian lands without any restrictions or reservations in its conveyances, it has exclusive jurisdiction over the lands underlying non-navigable bodies of water and may dispose of them without regard for the laws of the States in which said

lands are situated. As such areas are lands belonging to the United States, deposits of the Minerals specified in the act of February 25, 1920, supra, which occur in said lands are subject to disposition only in the manner prescribed in said act. It seems clear, therefore, that prospecting permits and leases may be issued for lands below the meander lines of non-navigable bodies of water separate from the abutting public lands, without regard for the laws of the State within whose boundaries they lie. *Such patents or other conveyances as thereafter issue for the uplands must, of course, clearly show upon their face the limitations necessary to prevent the passing of the title to the lands below the meander lines, in accordance with the State laws.*

In Rust-Owen Lumber Co. 50 L. D. 678, 681, the Department of the Interior passed upon certain questions therein involved, and stated:

> "This is in substantial accord with the doctrine announced in the case of Hardin vs. Jordan (140 U. S. 371). The latter decision held that the Government *parts with its title* to lands in the *beds* of *non-navigable waters* when its patents, without reservation or restriction, the abutting surveyed tracts, and *that the law of the state where the land lies governs* the extent of the title of the patentee in respect to the lands under water."

In the same case (p. 682) the Department of Interior construed the case of Hardin vs. Shedd in the following manner:

> "In Hardin v. Shedd (190 U. S., 508), the court was particular in stating its position as to the effect of patents for lands bordering upon *either navigable or non-navigable bodies of water*, and to show the distinction between the two classes. *It was held that the title passes from the Government in either case.* In the case of navigable

waters the submerged land does not belong to the Federal Government, having passed to the State by its admission to the Union. In the case of land bounded on non-navigable waters, the United States assumes the position of a private owner subject to the general law of the State, so far as its conveyances are concerned. In either case the effect of the grant on the title to the submerged land will depend upon the law of the state where the land lies."

The Department then quoted the holding by this Court in Lee Wilson & Co. vs. U. S. 245 U. S. 24, 29, 62 L. Ed. 128, 133, 38 Sup. Ct. Rep. 21, written by Mr. Chief Justice White, in which he submits to the rule of *stare decisis*.

The most recent statement of the position of the Department of the Interior is contained in a letter sent to the Clerk of the State Land Board of Oregon dated January 26, 1933. This is a public record and we assume it is proper to quote it, not as evidence but as the legal interpretation of the Department. The letter is as follows:

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

1482934 "E" EGH

Washington, Jan. 26, 1933.
Information.

Mr. G. G. Brown,
Clerk of State Land Board,
Salem, Oregon.

My Dear Sir:

Reference is made to your letter dated January 20, 1933, relative to the status of the bed of Oatman Lake, situated in Secs. 15, 16, 21 and 22, T. 39 S., R. 7 E., W. M., Oregon.

The official plat of this township, ap-

proved October 2, 1858, shows an unnamed meandered lake situated in the above-mentioned sections. The actual shore of the lake is represented as the boundary of the fractional subdivisions abutting thereon. Our records indicate that title to the lands bordering upon the lake has passed from the Government.

Upon the admission of a State into the Union the title to all lands under the navigable waters within the State inures to the State as an incident of sovereignty, and the laws of the State govern with respect to the extent of the riparian rights of the shore owners. With respect to lands bordering on non-navigable bodies of water, when the Government parts with its title without reservation or restriction, the extent of the title of the patentees to the lands under the water is governed by the laws of the State within which the lands are situated.

Accordingly, *the laws of the State of Oregon will govern* as to the extent of the title of the riparian owners *and as to the ownership of the bed of the lake.*

Very respectfully,

D. K. Parrott,

Acting Assistant Commissioner.

(Italics ours.)

The court can take judicial notice of this letter. Heath vs. Wallace, supra (34 L. Ed. p. 1068, second column, l 14). U. S. vs. Brewer-Elliott Oil & Gas Co. 249 Fed. 609, 619.

In State of Missouri ex rel Hemphill Lumber Co. 52 L. D. 307, the syllabus states:

"Where in a Government survey a body of water, navigable or *non-navigable* was meandered with a fair degree of accuracy and the *abutting* lands subsequently disposed of according to the

plat, title to lands that thereafter appear beyond the meander line is *dependent upon the laws of the State* within which they are situated."

The State of Iowa originally held that it was the owner of the beds of non-navigable lakes. Carr vs. Moore, 93 N. W. 52, 119 Ia. 152, State vs. Thompson, 134 Ia. 25, 26, 111 N. W. 328; and in State vs. Jones, 143 Ia. 398, 122 N. W. 241, it would seem that the individual opinions of judges whose predilections were more for the protection of private property than public interests, caused a questioning of the prior stand and left the question open, so that this court was compelled to do the same in Marshall Dental Company vs. Iowa, 226 U. S. 460. Apparently this ruling has given the State of Iowa no end of trouble, and they have attempted to get Congress to enact statutes granting to the State of Iowa, the interest of the United States, if any, in non-navigable lake beds. In the light of these facts the following opinion dated August 5, 1931, of the Secretary of the Interior which is reported in 53 L. D. 429-430, is highly illuminating:

> Reference is made to your (Hon. L. J. Dickinson) letter of July 22, 1931, in regard to titles to the beds of nonnavigable, meandered lakes in the State of Iowa. You suggest that a conclusion could be reached either by legislation or by action on the part of the Federal Government to be presented on a stipulation of facts and tried on briefs. . . . .
>
> *Since the case of Hardin v. Jordan* (140 *U. S.* 371), this department has followed the doctrines that the *Federal Government does not own the beds of streams or other bodies of water, whether navigable or nonnavigable, after it has disposed of the marginal uplands without reserva-*

tions or restriction, and that the extent of riparian rights is governed by local law. Therefore this department could not consistently recommend suit whereby the Government would make claim of legal title to beds of meandered nonnavigable lakes in Iowa, where the uplands were properly surveyed and disposed of.

I am not aware of *any case* where the Federal Government is *disposed to interfere with the State of Iowa in the control of such lakes*, and it does not appear feasible to anticipate and attempt to frame issues so comprehensive as to include all possible questions that might arise in the future. Inasmuch as the matter has been brought to the attention of Congress, I am strongly of the opinion that the subject can best be left for such consideration and action as the legislative branch may find advisable

The statement in this opinion that the Department of the Interior knows of no case where the Federal government is disposed to interfere with the State in the control of alleged non-navigable lakes, is rather humorous in the light of the record herein. This case was instituted by the Attorney General of the United States on December 1, 1931. It was tried before the Special Master November 2-14, 1931. The United States is claiming title to the entire area on the theory that non-navigable lakes are involved. (Report, p. 6). If the government's contentions are correct in this case, when can the State of Oregon expect them to contest the title of the innumerable lakes located in Oregon described in Defendant's Exhibit 56 (Abs. pp. 875-878), the identical lakes described in Plaintiff's Exhibit 56 (Abs. p. 878-882), and the general description of which lakes, showing their size, depth, and fact of having no water courses lead-

ing across state lines, is given by Stanley J. Jewett (not Hughet). (Abs. p. 882-889). See also Defendant's *Exceptions* 12 *and* 13. Surely it is time in the light of these administrative interpretations by the Department of the Interior that these important questions be settled on their merits; so that not only all States may be advised, but that the Department of the Interior may know what theories are being propounded by the bird reservationists and the Attorney General and Solicitor General of the United States, of which they seem to be supremely ignorant as disclosed by the opinion of August 5, 1931 last referred to.

Navigable or Public Waters—State Rule

The first case we cite is Broward vs. Mabry, 58 Fla. 398, 405, 50 So. 826, 328. The facts and law as given in this decision are as follows:

> . . . . *Lake Jackson* was at the time of said survey a natural lake, a body of water of irregular shape lying partly in the two townships named. At mean water it will average *not over two feet in depth*, except in a few basins where the water may be *eight or ten feet deep.* These basins are four or five in number, scattered over the lake at irregular intervals and separated by long reaches of shallow water. They are of an average of four or five acres in extent, except the largest, which may reach ten or fifteen acres. *The water except in these basins, is thick with water grasses, and cattle from adjoining plantations graze all over it from hoof to belly deep.* In several places there are *fords across the main body* and *broadest portions of the lake* which are used at all seasons by persons going back and forth between their plantations and Tallahassee, *on horseback and in buggies and wagons.* The lake can only be navi-

gated at ordinary stage with *flat-bottomed boats* drawing from *three* to *six inches of water*, except in the basins mentioned; and in fact the only navigation is in *boats*, or *bateau of the character mentioned, in fishing and shooting water fowl.* There are one or more subterranean outlets or sinks, through which the waters of the lake at times escape, leaving the entire bed, except in a few of the basins mentioned, entirely dry and at such times persons can walk dry shod over the whole bed of the lake. This situation existed at the time the bill in this case was filed, and when the negotiations for the sale of the unsurveyed portion of said lake charged in the bill were pending. The lake is partly surrounded by hills, and in time of excessive rains reaches a greater average depth than stated above as its mean depth; but the waters soon recede, and the lake returns to its normal condition. During *ordinary low water the lake recedes to such an extent that corn is planted and grown on the bottom lands constituting a part of the bed of the lake, to a considerable distance from the shore, by the occupants of the uplands.* The principal, and almost the only use the waters of the lake are put to is for the *grazing of cattle*, and *fishing and fowling.* The conditions stated have practically been the same as far back as the memory of the oldest inhabitant familiar with the locality reaches. That in making said survey the *lake was meandered.* That lot 2 in said fractional section 27 and lot 5 in said fractional section 26 border on said lake. (pp. 828, 829). . . . . .

The question to be determined is whether, under the patents to Dickerson and Harris, they took title to the land to the middle of the lake. No question of accretion, alluvion, or reliction, or of public or riparian rights in the use of the water, if any exist, is presented. The state in its sov-

ereign capacity is not represented here; but, if it be found that this lake is in fact navigable so as to vest the title to the bed of it in the state by virtue of its sovereignty, the relief asked by the complainant cannot be granted, though the complainant may be entitled to riparian rights as well as to easements in the lake in common with the public. . . . . .

Where a stream or body of water is permanent in character, and in its ordinary natural state is in fact navigable for useful purposes, and is of sufficient size and so situated and conditioned that it may be used for purposes common to the public in the locality where it is located, such water may be regarded as being of a public character, and the title to the land thereunder, including the shore or space between ordinary high and low water marks, when not included in the valid terms of a grant or conveyance to private ownership, is held by the state in its sovereign capacity in trust for the lawful uses of all the people of the state in the water and the land, subject to lawful governmental regulation of such uses. Capacity for navigation, not usage for that purpose, determines the navigable character of waters with reference to ownership and uses of the land covered by the water. Grants and conveyances of land bordering on navigable waters carry title in general to ordinary high-water mark when a valid contrary intent does not appear. . . . . .

From the allegations and admissions upon this record, it appears that, *notwithstanding the shallowness of the water* in portions and the uses at times made of its bed in places bordering on the shore the permanency, size, location, character, and conditions of the lake are such that in its ordinary state it, or at least a large part of it, may be *used for purposes of utility common at least to the people of the community* in which it is lo-

cated, and consequently that such waters may be regarded as being of a public character useful in ordinary conditions to numerous riparian owners, if not to the general public, for purposes of navigation, fishing, bathing, and other lawful uses, so that the title to the bed of the lake vests in the state in trust for all the people of the state.

The products of the community at least in some considerable measure may be transported upon the waters if so desired, and the *waters are admittedly of considerable area and useful for general navigation in small boats* containing persons engaged in pursuits either of *business* or *pleasure. Whether the lake has been used, for commercial purposes or not is immaterial, if it may be made useful* for any considerable *navigation* or *commercial intercourse* between the people of a large area. *The fact that the lake goes dry is unimportant*, if in its ordinary state it is in fact navigable.

It appears from this record, read in the light of common knowledge, that the lands under the lake belong to the state in its sovereign capacity in trust for all the people of the state for the uses afforded by the waters under the laws of this state. This being so, the patent to the state under the act of September 28, 1850, conveyed no title to lands under the navigable waters that inures to the appellants here.

It will be seen from the description of Lake Jackson in the foregoing case that Malheur Lake is greater in area and is certainly at least as of great a depth. The Supreme Court of Florida had no difficulty in construing that this body of water was a navigable body of water, or as other courts call it, public waters, it had no difficulty in holding that the State of Florida owned the bed and had no difficulty in impressing upon it

the same doctrine that it applies to waters which are navigable in the federal sense.

In Ex-parte Powell 70 Fla. 363, 373, 70 So. 392, 395, the Supreme Court of Florida, in again reiterating the usual rules relating to navigable waters, stated

> "The rights of the people of the states in the navigable water and the lands thereunder, including the shore or space between ordinary high- and low-water marks relate to navigation, commerce, fishing, bathing and other easements allowed by law. These rights are designed to promote the general welfare and are subject to lawful regulation by the states and such regulation is subordinate to the powers of Congress as to interstate commerce, navigation, post-roads, etc., and to the constitutional guaranties of private property rights."

In Fuller vs. Shedd, 161 Ill. 462, 44 N. E. 286, 33 L. R. A. 146, 52 Am. St. Rep. 394, the Supreme Court of Illinois, the matter being exclusively for it to determine, under the decision in Hardin vs. Jordan and Mitchell vs. Smale, supra refused to accept the doctrine of this court that the owner of a non-navigable lake owned to the center thereof and stated that the *theory of the rule and applicable to streams was not applicable to lakes*, one reason being that a stream will still exist notwithstanding changes by accretions, etc. and that the same reason does not exist where land borders on a lake, as by the recession of the waters the bed of the lake may become dry land and the lake cease to exist. The court said that to give such a construction would mean that a grant of land on a lake, would, on the instant of the grant, be a conveyance to the owner of the lake to the center of the lake, if the same rule existed as to rivers. The

court here recognized the difficulty of determination of boundary lines notwithstanding the methods mentioned in Hardin vs. Jordan where the lake had an irregular border, and furthermore the court called attention to the injustice of holding that the purchaser of a small rim of lake consisting of a few acres, should at once become the owner of thousands of acres of a non-navigable lake and accordingly many courts hold that the riparian proprietor takes only to the water's edge. The Illinois court called attention to the statement in Hardin vs. Jordan with reference to Trustees of Schools vs. Schroll, 120 Ill. 509, 12 N. E. 243, and with reference to this case stated:

> "We are asked to over-rule the latter case and hold the grant to the riparian owner conveys the bed of a non-navigable lake and makes its waters mere private waters. We decline to do so. By such holding, so long as such meandered lakes exist, over their waters and the bed when covered with water, the state exercises control and holds the same in trust for all the people who alike have benefit thereof in fishing, boating and the like."

The court called attention to the fact that such ruling did not deprive the upland owner of accretion.

In Wilton vs. Van Hesson, 249 Ill. 182, 94 N. E. 134, the Supreme Court of Illinois stated that in order to determine whether the complainant secured title to the bed of the pond involved therein from the United States, it was only necessary to determine the circumstances under which the United States Government retained title to the beds of lakes and ponds and the circumstances under which title became vested in the state. The court said:

"A clear and correct exposition of this policy is

given in Broward vs. Mabry, 50 S. 826."

The court then uses the following language:

"The only ground upon which the State of Illinois can now claim to own the bed of any pond or lake within its borders is under that clause of the enabling act which provided that the state should be admitted into the Union upon the same footing with the original state, and in all respects whatever. It could only acquire such title by virtue of that clause upon its admission into the Union, and, as has been pointed out, title by virtue of that clause was acquired only to the bed of such lakes as were navigable. There is no exception to this policy, unless it be the *apparent exception* in cases where the *government has meandered lakes or ponds* and shown the same on its surveys by meandered lines, *in which cases we have repeatedly held that the title to the bed of such lakes or ponds is in the State in trust for the people, and that the shore owners, whether the lake be navigable or non-navigable, take title to the water's edge, only.* This exception to the general policy,—if, indeed, it be an exception,—is undoubtedly based upon the ground that the Federal government, by its act in meandering a lake, indicates that *it is a navigable body of water, concedes that the title to the bed of the same is in the State, and by selling or otherwise disposing of the surrounding lands as bounded by the edge of the water, abandons all claim to the bed.*"

The true rule is again stated in Kregar vs. Fogarty, 96 Pac. 845, 847, 78 Kan. 541, 545. The court in this case said:

"The action of the government surveyors in meandering a body of water, or in surveying its bed, is to be considered as evidence upon the question of its navigability or unnavigability at the

time; but it is not conclusive. The surveyors are invested with no power to foreclose inquiry into the true character of the water. If the U. S. *has disposed of lands* bordering upon a *meandered* unnavigable water course or *lake*, by a patent *claiming no reservations*, and there is nothing else indicating an intention to withhold title to the lands within the meander lines . . . . it has nothing left to convey; and whether the title to the bed of the waters *is in the state*, or passes to the grantee under the patent, is determined by the local law."

See also State vs. Akers, 92 Kan. 169, 140 Pac. 637; Ann. Cas. 1916B. 543, a leading case holding the Arkansas and Kansas rivers *navigable so far as the State* was concerned and decreeing title to the beds thereof in the State.

The case of Lamprey vs. State, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 A. S. R. 541, is particularly interesting in Oregon for the reason that Justice McBride cited this case with approval and quoted extensively therefrom in the case of Guilliams vs. Beaver Lake Club, 90 Or. 13, 28, 175 Pac. 437, 442.

The facts and the law are given by the Supreme Court of Minnesota in the Lamprey case as follows:

"In 1853, at the time of making the U. S. survey of sections four, etc. there was in the center of these four sections a *shallow, non-navigable lake*, comprising about three hundred acres, which the government surveyor *meandered* in accordance with the rules and instructions of the department 'to meander all lakes and deep ponds of the area of twenty-five acres and upward,' (1 Lester, Land Laws, 714), and in doing so ran the meander lines substantially along the margin of the lake. * * * Since the survey in 1853, the lake has been, through natural causes, gradually and imperceptible

tibly drying up, until now its former bed is all dry land."

Court reviews authorities of a number of states, including Hardin vs. Jordan rejects the law of *Indiana* and *Michigan* as illogical, arbitrary and impracticable, discusses the reasons assigned for giving accretions and relictions to upland owner, and holds that the real reason is to preserve to the person who purchased the upland access to the water. The court then continues:

> "In this state, we have adopted the common law on the subject of waters with *certain modifications*, suited to the difference in conditions between this country and England, the principal of which are that navigability in fact, and not the ebb and flow of the tide, is the test of navigability, and that we have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use.
>
> "In accordance with the rules of the common law, we therefore hold that where a meandered lake is non-navigable in fact, the patentee of land bordering on it takes to the middle of the lake; that where the lake is navigable in fact, its waters and bed belong to the state, in its sovereign capacity, and that the riparian patentee takes the fee only to the waters edge, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions and relictions formed or produced in front of the land by the action or recession of the water. Of course, it is a familiar principle that these riparian rights rest upon title to the bank and shore, and not upon title to the soil under the water." P. 198.
>
> "What has been already said is sufficient for the purposes of the present case; but, to avoid

misconception, it is proper to consider *what is the difinition of test or 'navigability' as applied to our inland lakes.* The division of waters into navigable and non-navigable is but a way of dividing them into *public* and *private waters*,—a classification which, in some form, every civilized nation has recognized; the line of division being largely determined by its conditions and habits.

"In early times, about the only use—except, perhaps, fishing—to which the people of England had occasion to put public waters, and about the only use to which such waters were adapted, was navigation, and the only waters suited to that purpose were those in which the tide ebbed and flowed. Hence, the common law very naturally divided waters into navigable and non-navigable, and made the ebb and flow of the tide the test of navigability. In this country, while still retaining the common-law classification of navigable and non-navigable, we have, in view of our changed conditions, rejected its test of navigability; and adopted in its place *that of navigability in fact;* and, while still adhering to navigability as a criterion whether waters are public or private, yet we have *extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs* at certain seasons of the year. Most of the definitions of 'navigability' in the decided cases while perhaps conceding that the *size of the boats or vessels is not important*, and indeed, that it is not necessary that *navigation should be by boats at all*, yet seem to convey the idea that the water must be capable of *some commerce of pecuniary value*, as distinguished from boating for mere pleasure. But if, under present conditions of

society, *bodies of water are used* for *public uses* other than *mere commercial navigation,* in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why *boating* or *sailing for pleasure* should not be considered *navigation,* as well as boating for mere *pecuniary profit.*

"Many, if not the most, of the meandered lakes of *this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation;* but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the *people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated.* To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.

. . . . . .

"If the term 'navigable' is not capable of sufficiently extended meaning to preserve and protect the rights of the people to *all beneficial public uses of these inland lakes,* to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to *discard the old nomenclature* and adopt the classification of public waters and private waters. But, however that may be, we are satisfied that, so long as those lakes are capable of use for *boating, even for pleasure, they are navigable,* within the reason and spirit of the common-law rule. When the waters of any of them have so far receded or dried up as to be no longer capable of any bene-

ficial use by the public, they are no longer public waters, and their former beds, under the principles already announced, would become the private property of the riparian owners." 52 Minn. 190-8, 53 N. W. 1140-1143.

We wish to call the attention of the court to the fact that in the State of Minnesota the upland owner owns to high-water mark and he has a qualified ownership between high-water mark and low-water mark, and that the state is the owner of the bed below low-water mark. State vs. Korrer, infra.

In the case of Lamprey vs. Danz, 86 Minn. 317, 90 N. W. 578, a shallow body of water was meandered and surveyed by the United States Government and patented as surveyed land, so no question involved in this case arises in that case.

In State vs. Korrer, decided September 11, 1914, by the Supreme Court of Minnesota. 127 Minn. 60, 148 N. W. 617, L. R. A. 1916 C Page 140, court stated:

> 1. The first question is, What is the character of this body of water? The trial court found: 'That Longyear lake is a meandered public body of water . . . . having an area of more than 150 acres in extent . . . . that within the entire natural limits of said lake the same, during high water, is naturally suitable for boating, bathing, hunting, fishing, and other beneficial uses; that on the shore of said lake and in the main on the westerly shore thereof, ... is situated the village of Chisholm, having a population of more than 2,000 inhabitants.'
>
> The finding in substance is that these facts constitute Longyear lake, a 'public body of water.' This finding is sustained by the evidence.
>
> 2. Natural bodies of water are classed as navigable or non-navigable. The term 'navigable', as used in this connection, has been extended be-

yond its technical signification, and embraces many bodies of water not navigable in the ordinary sense of that term. The division of waters into navigable and non-navigable is but another way of dividing them into *public* and *private* waters and navigable waters embrace all bodies of water public in their nature. It is not necessary that the water should be capable of *commerce of pecuniary value.* If a body of water is adapted to use for public purposes other than commercial navigation it is held to be public water, or navigable water if the old nomenclature is preferred. *Boating for pleasure is considered navigation, as well as boating for mere pecuniary profit.* 'Navigability for pleasure is as sacred in the eye of the law as . . . navigability for any other purpose.'

Applying these rules, it must be held that this lake is a *public body of water* and is governed by the law applicable to *public or navigable freshwater lakes.* pp. 142, 143.

In Flisrand vs. Madson, 152 N. W. 796, 35 S. D. 457, the Supreme Court stated the facts and the law as follows:

Suit to quiet title and determine conflicting property rights. Lake Albert is a *natural, inland meandered lake* with irregular boundary and with extreme length of about five miles, and with extreme width of about 2½ miles; that the amount of water in said lake is variable, depending upon climatic conditions; that at times of *high-water* said lake bed is covered by water varying from *one* to *ten feet deep;* that at times of extreme and extended drought the waters of said lake gradually recede from the meander line and render portions of said lake bed *fit for the cultivation of crops; that* except at rare periods of extended drought the water in said

lake bed is of a depth of *one to ten feet;* abundance of *fish* in the water of said lake and was resorted to by the public for purposes of *boating, fishing, trapping and hunting. Island in lake not shown* on original government map occupied by defendant and about 18 rods from shore; *uncovered* when water was down; defendant had occupied it for many years and claimed title by adverse possession.

Then follows a fine discussion of navigability, and discussion of cases.

"We are therefore of the view that Lake Albert is a navigable lake within the meaning of sections 192 and 289 of our Civil Code, upon the ground that the waters of said lake are of such a character and extent that they constitute *public waters*, and that the state is the owner of the bed of said lake. And when we say that the state is the owner of the bed of said lake we do not mean that the state is the *proprietary owner*, in the sense that the state might sell or otherwise dispose of the same to private individuals for private ends, but that the state holds the title to such lake bed in trust for the benefit of the public. (Citing cases.) p. 800.

In the case of Anderson vs. Ray, 37 S. D. 17, 156 N. W. 591, we have a case from the sister state of South Dakota in which the facts and the law are given as follows:

Red Lake a meandered body of water with an area of approximately 3700 acres. County under Act of Legislature, Laws 1913, c. 18, was about to fill lake from artesian wells. The depth of the water in said lake *and in fact whether it contains any water at all or not depends almost entirely upon the seasons.*

"The size and depth of the lake and the purposes for which it has been used during times of

ordinary high water in the past show clearly, that, if the water is maintained at ordinary high-water mark, it will be susceptible of all the uses named in said *chapter* 18, *Laws of* 1913. This places it in the class designated in Flisrand vs. Madson, 35 S. D. 467, 152 N. W. 796 as 'navigable lakes'. Such lakes are 'public waters' and belong to the state for the benefit of all the people. *Such bodies of water are of value to the public as mere places of recreation, and ought to be preserved by the state for such purposes, if for no other.* After a consideration of the record before us, we are of the opinion that much of what is said in the Flisrand case applies to the facts of this case. . .

"Tested by the rule announced in the Flisrand case and the cases therein cited, the *state is the owner of the bed of Red Lake* subject, of course, to the limitations named in that case. . . . .

Court holds that public has right to raise the level of the waters to the ordinary high water mark. p. 594.

For the convenience of the court, we copy chapter 18, Laws of S. D. 1913, which were involved in the Anderson vs. Roy case, and said act of the legislature is as follows:

Be it enacted by the Legislature of the State of South Dakota:

Section 1. That upon the affirmative vote of a majority of the electors of any county at a previous general election of such county, the Board of County Commissioners of such county in this state in which there is a meandered lake or lakes which was regularly meandered by the United States surveys, and hereby authorized and empowered to construct, or to authorize construction of artesian well or wells for the purpose of maintaining a sufficient quantity, or a full stage of water in such lake or lakes, for *rowing, fishing, fowling, bathing or other purposes.*

Section 2. The Board of County Commissioners of the counties in which such meandered lake or lakes are situated and artesian wells constructed, as mentioned in Section 1 of this Act, are hereby authorized and empowered to make Rules and Regulations, not in conflict with the game, fish or other laws of this state, to care for and govern such lands and water within the meander lines of such lake or lakes, as they may, from time to time, deem necessary and proper.

In the case of State ex rel Clark Attorney General, vs. Deisch, 38 S. D. 560, 162 N. W. 365, the following facts and law appear in the case:

Action by the State on the relation of the attorney general to enjoin defendant from draining Platte Lake.

Platte Lake a well defined body of water situated upon 6 sections of land and *meandered*. From 1881 to 1905 contained water varying in depth from *one* to *six* feet according to seasons. In wet years water sometimes extended up to the ordinary high water mark and in dry seasons receded from the shore line in accordance with the quantity of water in the lake. During a few years between 1890 and 1900 lake was nearly dry during a portion of the year, but never entirely so. The lake when normally full contained about 1100 acres; banks are well defined, water comes from drainage of a territory about 75 square miles. Two creeks feed lake. Lake used by people of the community for *boating, hunting, and other like purposes, lake covered with wild rice and rushes and frequented by ducks, geese and other wild fowl.*

Defendant dug canal which lowered the natural outlet of the lake approximately 4 feet, and water lowered accordingly, and water caused to recede from shore. Reliction sudden, violent and unnatural.

Defendant enjoined, and judgment entered enjoining defendant from draining lake and requiring him to close the drain already constructed and to restore the land at the outlet of the lake to the condition it was in when he dug the drain in 1905. Affirmed on appeal.

The Court held that Platte Lake is a navigable or public body of water within the purview of the decision of the court in Flisrand vs. Madson supra.

In State vs. West Tennessee Land Company, 127 Tenn. 575, 580-2, 158 S. W. 746, 747-8, Ann. Cas. 1914 B, 1043, 1044, the facts and the law announced by the court are as follows:

> . . . . The only question for determination is whether Reelfoot Lake is a navigable body of water in the technical legal sense of that term. If it is, we think it is beyond dispute upon the authorities that neither the waters nor the lands underlying them are capable of private ownership. If it is not, and is navigable only in the common or ordinary acceptation of the term, then both the waters and the lands underlying them are capable of private ownership and belong to the defendants. This one question of the navigability of the lake is inclusive of all questions made upon the appeal, and determines the entire controversy.
>
> The lake was formed by an earthquake in 1810. The result of the earthquake was to lower the lands upon which the waters of the lake rest several feet below the surrounding lands. The submergence of the land carried down the forest timber growing upon it, and these timbers and their remains are still in the lake. The lake is from two to seven miles wide and about fifteen miles long, with an average depth of about *seven feet*, except at Beaver Dam and Brewer's Bar, and at and *near the shore lines*. At places along

the shore lines and probably along their greate
distance, the water is only a few inches deep fo
several yards out into the lake. The shallo
water along the shores and in the lake is fille
with vegetation natural to wet lands in this cl
mate. The water, at its ordinary stage at Brew
er's Bar and Beaver Dam is from a few inches t
two feet in depth. These shoals are from 200 t
300 yards wide. There are numerous deep poo
of water in the lake, ranging in depth from seve
feet to more than twenty feet; but they have n
continuous open connection with the other wate
of the lake. They are surrounded by trees, whic
project in many instances above the water, bu
many of them have rotted off at the water's su
face; but the stumps of the trees remain sub
merged in the water of the lake.

Upper Blue Basin, in the northern portion o
the lake, is about two miles long with an averag
depth of probably ten feet, and is open and fre
of obstructions. It is surrounded, however, wit
timber and stumps. The part of the lake sout
of Upper Blue Basin is five to seven miles wid
and several miles long. It is separated from Up
per Blue Basin by Brewer's Bar, which makes
strip of shallow water only a few inches to tw
feet deep and probably two hundred yards wid
There are a number of other smaller basins practi
cally free from stumps and timber, in the southern
portion of the lake; but, like the other bodies o
water, they have no open connection with eac
other or with the main body of water on accoun
of the stumps and timber. Most of the snag
standing in the lake are bare of limbs; but man
dead snags still stand at a height of thirty t
forty feet above the surface of the water. . . .

From 300 to 400 people take fish from th
waters of the lake daily and employ in this ca
pacity something like 1,000 small boats, canoe

and batteaux. They take annually from 1,000,000 to 1,500,000 pounds of fish. Wild fowl are killed upon its waters every year in large quantities. * * p. 1045.

The chief importance of determining whether Reelfoot Lake is navigable in the technical legal sense *does not concern its use as a public highway for commerce*, but is in regard to the respective rights of the public and private person in the use and ownership of its waters and the lands submerged by them. It is primarily a question of dominion and ownership, rather than one of commerce and travel. The right of the public to use its waters as a highway for commerce is precisely the same, whether the lake be navigable in the technical sense or whether it be navigable only in the common or ordinary sense. The distinguishing difference between the two classes of streams is capacity; that is, depth, width, volume. The legal effect of this difference is upon the title, the right of soil in waters and the lands under them, and the fisheries. If a given body of water falls within one class, it belongs to the public; if in the other, it may be privately owned. . . . . .

Inasmuch, therefore, as the lake has capacity for navigation in the technical sense, as laid down in Stuart v. Clark's Lessee, supra, the rights of the public attach to it, to its use, and to its fisheries, so that it is incapable of private ownership, and the state owns it in trust for all the people, and cannot alienate it away. . . . . .

For the reasons stated, it is our opinion that the complainant is entitled to a decree establishing its title in trust for all the people to that portion of the lake, its fisheries and fowling privileges, lying outside of, and not over and above, the grants issued by the State of North Carolina to Doherty. p. 1050.

In Ne-pee-hauk Corp. vs. Wilson, 96 Wis. 290, 291-2, 71 N. W. 661, the facts and the law are given in the reported decision as follows:

> The question controverted is the title to the lands under Mud Lake,—Whether the plaintiff owns them by virtue of riparian ownership, or whether the title is in the public. This depends on whether Mud Lake is a watercourse or a meandered lake. It varies in width from about thirty-five rods to sixty-five rods, and is about three miles in length. In spring and fall and after heavy rains, the whole surface is covered with water. In summer much of the water disappears, leaving some considerable expanses of water interspersed with *mud, marsh, and bog.* In the places which are covered by water, rushes and wild rice grow luxuriantly. There are small openings of clear water, but no regular channel anywhere, except at a place called the 'Narrows,' below the point where the alleged trespass was committed. In ordinary stages of water it was navigable only by small craft, like canoes or hunting skiffs, propelled by paddles or push poles. What is called 'Mud Lake' is formed by the expansion or dispersion of the waters of a small stream called 'Grand River.' After the Grand river enters into and becomes Mud Lake, it follows no definite channel, but distributes itself through the marsh, and appears again as a stream only at or near the point called the 'Narrows.' Mud Lake is in fact, for the most part, a *low, wet marsh, producing a large growth of wild rice and other vegetation and unnavigable by any natural channel, by any kind of boat, through its entire length, during the greater portion of the year.* The lands bordering upon it were meandered by the government surveyors. In the field notes it was referred to as a 'lake' or 'marsh'.

The court found that Mud Lake is a meandered lake, and that the title to the lands under it is in the public and not in the plaintiff, and dismissed the complaint, with costs against the plaintiff. The plaintiff appeals. . . . . .

It is well settled in this state that grants by the United States of lands bounded by a meandered lake or other permanent body of water, convey title only to the natural shore of the body of water, while the title to the land which is under the water is in the state. Diedrich v. N. W. U. R. Co., 42 Wis. 248. And the rule is the same whether the body of water can be made *practically useful for the purposes of navigation or not*, (Boorman v. Sunnuchs, 42 Wis. 233), *irrespecitve of its size or depth.*

It is indisputed that Mud Lake was meandered by the government surveyors. It is clear that it is an *inland body of water* of permanent character. While it might with entire propriety and accuracy be called a marsh or swamp, the *name by which it shall be designated is not controlling upon the question of the title to its bed.* It has very little, if any, movement of its water from its head towards its outlet during the greater part of the year. It is said that the controlling distinction between a stream and a lake or pond is that in the one case the water has a natural motion,—a current,—while in the other the water is, in its natural state, substantially at rest; and this entirely irrespective of the size of the one or the other. But not every sheet of water in which there is a current from its head towards its outlet is therefore a stream. Angell, Water Courses, 6th ed. (Perkins), Para. 4f. It is said that even the large lakes have such a current. The trial court found that this was not a stream or watercourse, but was a 'shallow, muddy lake or marsh.' Such it is clearly shown to be by the evidence.

> The plaintiff does not own the lake or the soil under it. *It is owned by the state.* The right of fishing and fowling upon such waters is in the owner of the soil which is under the water. . . . . In this case *it is in the public,* which has not in any way granted its right to the plaintiff. The plaintiff's right to hunt and fish over this lake was equal to, but not superior to the right of either defendant. It had no cause of action against the defendants. Its complaint was properly dismissed on the merits."

It is interesting to note that Wisconsin in its early history declared its policy as to meandered and navigable lakes and the statute which it adopted has remained in force ever since and can be found by an examination of Wisconsin Statutes, 1917, page 270 (30.01). The statute is as follows:

> "All lakes wholly or partly within this state which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all lakes which are navigable in fact whether meandered or not meandered are hereby declared to be navigable and public waters and all persons shall have the same rights therein and thereto that they have in and to any other navigable or public water."

After a discussion of the subject found therein and in the preceding case, the Supreme Court of Wisconsin in Illinois Fuel Co. vs. Bilot, 109 Wis. 418, 438, 85 N. W. 402, 405, 83 Am. St. Rep. 905, 919.

> . . . . Was the territory in question originally a part of the bed of a lake or pond, or part of the bed of a river? *The mere fact that the water was very shallow, so that marsh grass appeared above the surface, that it was called a marsh, and that*

the water was not deep enough to admit of navigation, or that the surface was not at all times wholly submerged, does not preclude its being in fact a lake. All those conditions existed in Nepee-nauk Club v. Wilson, 96 Wis. 290, 71 N. W. 661, yet it was held there that the territory in dispute was a lake. Size or depth of a body of water, it was there said, does not solve the question of whether it is a lake or river. If the land in question was inside of the natural shore of Lake Michigan, or of any body of water not a river, so that water did not merely beat upon it as a shore, but covered it, or if the land was covered by water, not a part of Lake Michigan, yet not a part of a river, manifestly plaintiff never obtained title thereto through or under the patent from the government.

In Diana Shooting Club vs. Husting, 156 Wis. 261, 271, 145 N. W. 816, 820, decided February 24, 1914, the court of Wisconsin said:

The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters, and as such they should enure to the benefit of the public. They should be free to all for *commerce*, for *travel*, for *recreation*, and also for *hunting and fishing*, which are now mainly certain forms of recreation. Only by so construing the provisions of our organic laws can the people reap the full benefit of the grant secured to them therein. This grant was made to them before the state had any title to convey to private parties, and it became a trustee of the people charged

with the faithful execution of the trust created for their benefit. Riparian owners, therefore, took title to lands under navigable waters with notice of such trust, and subject to the burdens created by it. . . . . .

Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a *navigable stage*, and between the boundaries of *ordinary high-water marks*. When so confined it is immaterial what the character of the stream or water is. It may be *deep* or *shallow, clear or covered with aquatic vegetation*. By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestial vegetation, or other easily recognized characteristic. . . . . And *where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point or ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to* determine whether a given stage of water is above or below ordinary high-water mark. . . .

In In re Horicon Drainage District, 136 Wis. 227. 233, 116 N. W. 12, 14, the Court said:

"We do not regard it as necessary to go into the question whether Rock river is in fact navigable. It was declared by legislative authority; therefore must be treated as one of the navigable streams of the state in carrying out the provisions of the drainage law. The policy of the legislature of this state has been to preserve navigable waters of the state from impairment, and this court has held it is the duty of the legislature to do so. . . . . So in view of the history of legislation upon the subject, we think it plain that all waters declared navigable by act of

> the legislature must be regarded navigable waters of the state and not subject to impairment under the drainage laws, at least in the absence of express authority conferred upon the drainage commissioners, if, indeed the legislature has power to confer authority to impair navigable waters or the common-law incidents of navigation. The policy of this court as shown by a long line of decisions has been to scrupulously protect the navigable waters of the state from impairment.

The Special Master attempts to minimize the effect of the Wisconsin cases, and to show that the supreme court of that state applied the rule that Federal grants are to be construed according to Federal and not state law, a rule which may be conceded to be correct as applied to uplands. But *Federal rule applies* and adopts *state rule as to lands under water* fronting uplands which have been conveyed.

As to the Wisconsin cases the Special Master on page 50 of his Report attempts to show that Wisconsin in the Mendota Club Case and the Whitney case, modified its rule so as to hold that whether the title to land which had once been the property of the United States has passed must be resolved by the laws of the United States and therefore the effect of the Wisconsin cases had been overruled by its court. Yet as we have seen this rule of law is not applicable when applied to the *effect of grants* upon a *meandered lake or stream*. The Supreme Court of Wisconsin corrected the erroneous statement cited by the Special Master on page 50 of his Report. In the subsequent case of Farris vs. Bentley, (1910) 141 Wis. 671, 674, 124 N. W. 1003, 1004, the court said:

> "It is equally well settled that where the United

States grants lands *bounded by streams*, and *makes no reservation or restriction*, the grant will be *given effect* according to the *law of the state* in which the land lies."

Citing Hardin vs. Jordan and other cases.

Again in Blatchford vs. Voss, (1928) 197 Wis. 465, 219 N. W. 100, 101 (3, 4), 102, where the plaintiff attempted to secure a ruling by the supreme court of Wisconsin as stated in the two early cases cited by the Special Master on page 50 of his report, after referring to section 30.01 (3), (c) Stat. the substance whereof first appeared as section 3 of chapter 72, Laws of 1853, and thereafter as section 1597, and to Hardin vs. Jordan, Mitchell vs. Smale, Hardin vs. Shedd, and Kean vs. Calumet Canal Co., though noting that these "were accompanied by very vigorous and persuasive dissenting opinions" the court said:

"In those cases and many others the *primary rule is recognized* that it is the *state decisions that control* as to disputes in regard to such class of titles." (219 N. W. 101).

And again on p. 102, the court in referring to the rule relied on by the Special Master herein in his Report, p. 50, said:

"It may be conceded that such statement is not accurate in view of what was said by this court in Farris vs. Bentley . . . . . and as *often held by the federal courts*, namely, that where questions as to land titles under federal grants are to be determined, the solution is to be found under the particular *laws and court decisions of the state wherein such land lies rather than under* any general or *federal rule*," (Citing cases by this court).

The court was referring to grants bordering on

waters not to grants by the United States generally.

In Welder vs. State, Tex. Civ. App., decided June 27, 1917, 196 S. W. 868, the facts as given in this case are found on page 869 of the Southwestern Reporter and are as follows:

> "Green Lake, the subject of controversy in the case is an *inland fresh-water lake* . . . . The lake is *shallow at the margin, gradually becoming deeper for a distance of a few hundred feet* where it attains its maximum depth, the remainder of the bottom of the lake being practically level, and the water being of an average depth at the ordinary water stage of about *four feet*. On accasion of any considerable overflow of the Guadalupe river (which occurs not infrequently) the lake is filled by the flood waters of the river, and this is the main source of the renewal of its waters. During times of large overflows the whole valley of the river to the foothills, including the lake and all of the surrouning country, is submerged. The lake contains approximately 6000 acres of land and is 13 miles in circumference.
>
> Green Lake has been used as a watering place for stock. Fish in considerable quantities have been taken from it and sold and *boats have been* operated on it for the purpose of *taking fish*, and lake is of some value as a fishing preserve.
>
> Not likely that lake will ever be of any public value as a *highway of commerce*. Land around *grazing land*. Sail boats drawing *two feet* of water and used for carrying three cords of wood used in 1861; *light skiffs and boats were used for hunting and fishing*. The court finds that lake in its ordinary condition has a depth of four feet over the greater part of the lake and is susceptible of use for fishing, pleasure and commercial boats provided the boats are of light draft. p. 869.

Upon these statements of fact the question was whether the bed of this lake belonged to the state. The Court said:

> This question has given rise to considerable litigation in the different states of the Union, though this appears to be the first of its kind in this state. . . . . .
>
> "The authorities . . . are in (hopeless) conflict, and seem to be incapable of reconciliation."
>
> The 'reasonable rule' referred to is that the law as to extending calls for non-navigable streams to the center thereof does not apply to lakes, a rule which we approve, but we also think it a reasonable rule that *lakes large enough* to be useful to the public for *boating and fishing* should be held to be *public* and not private property . . . . . The trial court found certain facts as to the size and depth of the lake, and the purposes for which it had been and probably would be used, and from these facts deduced as a matter of law that Green Lake was *not navigable.* We accept these facts and deduce the opposite legal conclusion.

It appears from an examination of the decisions in the state of Washington, our sister state, that that state has joined the class of states, which without vision, have short-sightedly granted the title to beds of navigable waters of the State of Washington to the riparian owner. (See State vs. Sturdivant, 76 Wash. 158, 135 Pac. 1035; 1036-1040, Bernot vs. Morrison, 81 Wash. 538, 143 Pac. 104, Ann. Cas. 1916 D, page 290,299.

Within the doctrine of the foregoing cases, we submit it is perfectly apparent that it was within the competence of the Legislature of Oregon to declare the state policy as to the title to beds of navigable

lakes, navigable within the sense as used by the Federal court and also to establish the same doctrine of public waters and reserve the beds thereof for the people of the state to waters which are navigable or public waters in the sense used by the Legislatures and the decisions of the far-seeing states which have attempted to preserve for all of the people the benefits which may be derived by retaining ownership to the bed of public waters, and we respectfully suggest in the light of these decisions that navigation for sport, recreation, and pleasure will, as the years come and go, be increasingly recognized from the standpoint of public health and longevity and therefore of public benefit, as important as navigation for profit. Oregon has joined the list of states which believe that man does not live by bread alone.

(4) If the Rule in Oregon be that the Grantee Takes to the Center of the Lake, Does that Rule Apply to a School Section to which Oregon became Entitled under the Act of Admission, Effective, However, Only upon Approved Survey (240 U. S. 210, lines 1-7) if it be Disclosed that the Section Borders Upon a Meander Line; and is the Rule Applicable to School Sections Equally Applicable to Indemnity Lands taken in Lieu of Deficiencies in School Sections?

(Report of the Special Master, p. 52)

Exceptions 113-118

The Special Master has taken the view that inasmuch as there is no patent nor other documentary

form of grant in the matter of the conveyance to a state of school sections nor indemnity lands that therefore the fact that the state acquires title thereto without a specific patent or documentary form of grant prevents the application of the rule as to the *effects of grants* upon a meander line. The effect of ordinary patents with reference to lands is well stated by the following principle and cases:

It is a well settled principle of law repeatedly held by both State and Federal courts that when lands are granted according to an official plat of the survey of such lands, the plat, itself, with all its notes, lines descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.

Cragin vs. Powell, 128 U. S. 691, 696; 32 L. Ed. 566, 567, 568; 9 Sup. Ct. Rep. 203, 205.

Jeffries vs. East Omaha Land Company, 134 U. S. 178, 194; 33 L. Ed. 872, 878; 10 Sup. Ct. Rep. 518, 522.

Chapman & Dewey Lumber Co. vs. St. Francis Levee District, 232 U. S. 186, 197; 58 L. Ed. 564, 568; 34 Sup. Ct. Rep. 297, 299.

Mitchell vs. Smale, 140 U. S. 406, 413; 35 L. Ed. 442, 445; 11 Sup. Ct. Rep. 819, 822.

Round Mountain Mining Co. vs. Round Mountain Sphinx Mining Co., 138 Pac. 71, 75, 36 Nev. 543, 558; citing cases.

The question is as to the correctness of the Special Master's view. In Oklahoma vs. Texas, 258 U. S. 574, 598, as quoted by the Special Master it was held that Oklahoma as owner of school lands was "entitled to the same incidents of riparian ownership that any

other owner would have," and the Special Master cites Frasher vs. O'Connor, 115 U. S. 102 to the effect that the list with reference to indemnity lands

> "shall be regarded as conveying the fee simple of all lands embraced in such list,"

and again, where this court said

> "that the title to the state of the lands thus became as complete as though transferred by a patent of the United States."

As a conclusion the Special Master states

> "all this is quite consistent with the point taken, i. e., that as a matter of conveying the title of school and indemnity lands bordering on a meander line carries no part of the bed of the lake thus meandered although good title passes with all riparian rights attached." (Report, p. 54).

We are unable to see why the rule stated in Hardin

> "Grants of the government for lands bounded on streams and *other waters, without reservation or restriction of terms,* are to be construed as to their effect *according to the law of the state in which the lands lie,*"

does not apply with equal force to lands granted under the Act of Admission including school lands and indemnity lands. It is true that in Hardin vs. Jordan and in a number of the other cases the grants were patents conveying *according to the official plat of the survey* of such lands. It seems to us that it is a considerable stretch of the intention involved to say that it requires a specific patent with a phrase in it "according to the official plat" before the effect of such grants shall be determined by state law. So far as the actual grants for the lands themselves were concerned when the lands were surveyed on the upland and a meander line established and these

lands pass to the state, either as school lands or indemnity lands, they pass as specific lands "according to a plat" of an actual survey meandering upon a lake. It seems to us that the effect of such grants, which are really grants pursuant to an Act of Congress, and which become operative with reference to a specific plat, really adopt the plat as a part of such grant, just as much as though a specific *document of conveyance* were executed and delivered by the United States to the State of Oregon. It seems to us that the two cases cited by the Special Master bring school and indemnity lands within the purview of the rule stated in Hardin vs. Jordan.

The Special Master reached the conclusion that lands under the beds of lakes are not added to school and indemnity lands bordering on meander lines (Report, p. 52; Defendant's Exception 115), and he holds that Oregon acted upon that assumption because she used deficiencies in fractional school sections bordering on the meander line boundary as base for lieu lands selected by her elsewhere, (Report, p. 52, 53; Defendant's Exception 114), and the Master further held:

> "The idea of enjoying the deficiency within the meandered area and the right to go from the meandered line to the center of the lake are inconsistent." (Report, p. 53; Defendant's Exception 116).

In reference to this position of the Special Master the State of Oregon submits that the acts of its administrative officers in using deficiencies as base for the selection of school lands elsewhere should not consitute an estoppel against the State of Oregon. Further, that the rule sought to be invoked and the

reasoning of the Master thereupon should be no more applicable to the selection of base on non-navigable waters than on navigable waters. Instead of the acts of the officers of Oregon constituting administrative constructions and interpretations preventing the State of Oregon from asserting title to the bed of the lake, the acts of the officers as a matter of fact have exactly *the opposite effect*. The lakes were meandered by the government and the officers of the state were certainly justified in assuming that lakes of such vast extent as the lakes involved in the case at bar were navigable. Surely the selection of lieu lands where school sections are rendered fractional by the meander lines of navigable lakes and the use of such base by the state could not be construed to mean that the title of the State of Oregon under navigable waters was relinquished to the government by the use of the base, and equally the use of base by the State of Oregon on its fractional sections upon the meander line were acts of the officers of Oregon entirely consistent with the theory that the waters were navigable, and this court has called attention to the fact in Wear vs. Kansas, 245 U. S. 154, 158, 62 L. Ed. 214, 219, that:

> "The circumstances that the stream (lake) was meandered in the original surveys"

may properly be considered by a state and by this court as determining a state's policy as to its lakes and other waters. And though it is true as stated in Oklahoma vs. Texas, 258 U. S. 574, 585, that surveying officers are not clothed with power to settle questions of navigability, yet when it is sought to estop state officers who have selected lieu lands using deficiencies in school sections on a large meandered

lake as base on the theory that the lake as a matter of fact is navigable instead of non-navigable, as now contended, we think there is considerable merit in the various cases as to the effect of the meandering of a stream, typical of which is Crawford Co. vs. Hathaway, 67 Neb. 325, 351, 93 N. W. 781, 789, 108 Am. St. Rep. 668, where this court stated:

> . . . . . When the government, in its survey, *runs meander lines* along the banks of a stream and *parts with its title to the adjoining land*, the boundary of which would be the high-water mark, *then it would seem permissible to classify the stream as navigable*, in which case the waters thereof and the bed thereunder would *belong to the state*, and to be held by it in trust for the people. The waters in such streams would be held to be publici juris, and not subject to riparian claims by the adjoining land owner.

Accordingly we claim that the Special Master erred and our Exceptions 113 to 118 inclusive should be held well taken.

(5) If Fractional Sections of School Lands Border upon a Meandered Lake and the State Uses the Deficiency within the Meandered Lake as Base for Lieu Lands, is the State also Entitled to the Benefit of the Rule of Hardin v. Jordan?

(Report of the Special Master, p. 54).

Exceptions 119-121

Finding VIII of the Special Master, referred to on page 54 of his Report and his conclusions there-

from have been analyzed under the preceding subject matter and need not be restated. The Special Master restates his conclusions on page 55 of the Report which is the subject matter of our Exception 120 (Defendant's Exceptions, p. 96, 97). Our answer thereto is set forth on page 97 of Defendant's Exceptions. A further discussion of this subject matter is found on the bottom of page 71 and 72 of the Master's Report and this is referred to in Defendant's Exception 119, (Defendant's Exceptions, p. 96), and the answer contained therein we deem a sufficient answer to this position stated by the master. We submit that Defendant's Exceptions 119 to 121 inclusive should be held well taken.

(6) Are the statutes pleaded in Haec Verba in the Amended Answer and Counterclaim (also set out in Supplement, infra, pp. vi to xiv) Effective to give Oregon title to the Lands Within the Meander Line Boundary, or to any thereof?
(Report of the Special Master, p. 55).

Exceptions 122-128

Portions of the Acts of the Oregon Legislature of 1917, 1923, 1931, pleaded in the Amended Answer, are set forth on pages 56 and 57 of the Report of the Special Master, and full copies thereof are set forth in the Supplement to the Report, pp. vi-viv. The date when these several acts became effective is accurately stated by the Special Master on page 55 of his Report.

To those portions of the Special Master's Report, pp. 55-61, covering his discussion of this subject matter and which we claim are incorrect, we have challenged in Defendant's Exceptions 122-127 inclusive. The Special Master stated that the legislation in Oregon is an undue interference with the power of the United States to dispose of her own lands.

We submit that the State of Oregon is not attempting to take from the United States its lands against its will or against its laws, nor is it attempting to place the public domain at the mercy of state legislation nor is it trying to acquire property of the United States by legislative fiat. Nor is Oregon's legislation something new with reference to matters of this kind. The State of Oklahoma passed a statute which was referred to in Oklahoma vs. Texas, and the State of Utah passed a statute referred to in the case of United States vs. Utah. However in both of those cases the lands involved were lands which were specifically retained by the government. In the Oklahoma vs. Texas case the United States intended to and did dispose of the upland and the northerly half of the river bed but nothing more, and the case turned upon the construction of the terms of the grant made before statehood. The facts are not similar to the case at bar and accordingly the State of Oklahoma statute could not affect the right of the government to determine whether the bed of the river of the land it had specifically retained was non-navigable.

In the case of the United States vs. Utah the United States was attempting to settle the title to lands riparian to and on both sides of and including the bed of the stream fronting unpatented public lands still owned by the United States. The pleadings in this

case specifically show that the government did not attempt to assert title to the beds of the streams included within mineral claimants' rights not fronting upland which had been patented. We call the attention of this court to the facts in our Exception 141, filed herein. It is perfectly clear that with reference to those portions of the streams involved in the case of United States vs. Utah, the uplands of which were still owned by the United States, and in fact a great portion of which were unsurveyed, that the statute of Utah could not affect the bed of the stream fronting such public land. And this court well said that the State of Utah could not by legislation divest lands which were vested in the United States.

However in the case at bar the State of Oregon invokes the construction to be applied to grants without reservations or restrictions, and as we have seen elsewhere in this Brief the effect of such patents is determined by local law. A further discussion of this subject matter is not required herein at this place as it has been covered under the discussion of the Master's Questions of Law numbered 3, supra. We specifically set forth in our Exceptions 122 to 128 wherein the Master erred in his Report, and what he should have found in lieu of what he did find. The Special Master in his Report has refused to give any consideration therein to the legal effect and statement of this court in Donnelly vs. U. S., heretofore referred to, Wear vs. Kansas, heretofore referred to, Oklahoma vs. Texas, and Brewer-Elliott Oil & Gas Company vs. United States, all heretofore referred to, and the Special Master has also completely ignored the decision of the courts in Harrison vs. Fite, Jackson-Walker Coal & Material Company and Shore

vs. Shell Oil Company, all of which cases have heretofore been analyzed. He has of course refused to give any weight to the supreme courts of the states. If this court left unsettled in Hardin vs. Jordan and Hardin vs. Shedd the question whether the state acquires title to the bed of a non-navigable lake when the grantee of shore lands has no title except to the water's edge as indicated in the Marshall Dental case and as quoted by the Special Master on page 47 of his Report, it seems quite clear that this court went a long step toward settling that question in Oklahoma vs. Texas when it made the pronouncement of law quoted on pages 38 and 39 of the Master's Report, and which cited Hardin vs. Jordan. We believe this court finally did settle the rule of law in Brewer-Elliott Oil & Gas Company vs. United States, when it said:

> "Some states have sought to retain title to the beds of streams by *recognizing them as navigable when they are not actually so.* It seems to be a *convenient method of preserving their control.* No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river, granted and vesting before statehood, depends for its validity on non-navigability of the stream in fact. In such a case, navigability vel non is not a local question. In Wear v. Kansas, 245 U. S. 154, 62 L. Ed. 214, 38 Sup. Ct. Rep. 55, Ann Cas. 1918B, 586, upon which the appellants reply, the patent of the United States under which Wear derived title was a grant made before statehood, to land bordering on the Kansas river, without restriction, reservation or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land

> on a navigable stream did not convey the bed of the river. *The United States by its unrestricted patent, was properly taken to have assented to its construction according to the local law.* Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a non-navigable stream, was immaterial. . . . . .

This decision we believe unqualifiedly gives the state a right, when the United States has issued unrestricted patents, to assert title to the beds of non-navigable lakes and streams by recognizing the same as navigable when they are not actually so. What else does this court mean by stating that this *right* gives the state a *convenient method of preserving their control?* What else does this court mean by stating that *no one* can object to it, (this *includes the United States,*) unless it is one whose right to the *bed* of the river or lake *granted and vested before statehood* depends for its validity on *navigability in fact?*

This is the right which the State of Wisconsin exercised a long time ago. (See Wisconsin Stat. 1917, p. 270, 30.01). This is a right which the State of South Dakota exercised. (See Laws of South Dakota, 1913, Chap. 18).

The following statutes are very instructive:

California. Political Code of California, 1915, Deering, p. 835, Sec. 3493m.

> "Any person desiring to purchase any of the lands now uncovered or which may hereafter be uncovered by the recession or drainage of the waters of inland lakes, and inuring to the state by virtue of her sovereignty," etc.

Illinois. Illinois Statutes Annotated, Jones and Addington, Vol. 1, p. 698.

Sec. 793—General Supervision of Waters—Encroachments—Actions.

Sec. 803—It shall be the duty of the state rivers and lakes commission to furnish at actual cost to any person or persons who may be desirous of reclaiming, draining or cultivating any wash or overflowed lands in connection with any of the public water of the state of Illinois.

Wisconsin. Statutes 1917.

Sec. 30.01. (1) Lakes. All lakes wholly or partially within this state which have been meandered and returned as navigable by the surveyors employed by the government of the United States, and all lakes which are navigable in fact, whether meandered or not meandered, are hereby declared to be navigable and public waters, and all persons shall have the same rights therein and thereto that they have in and to any other navigable or public waters.

(2) Streams. All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States, and all rivers, streams, sloughs, bayous, and other outlets, whether meandered or non-meandered, which are navigable in fact for any purpose whatsoever are hereby declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the legislature.

Florida. Compiled Laws, 1914. Vol. 1. p. 345, 346.

Sec. 644. Nothing in this article contained shall be so construed as to release the title of the State of Florida, or any of its grantees, to any of the swamp or overflowed lands within the limits of the same, but the grant herein contained

shall be limited to those persons and bodies corporate owning lands actually bounded by, and extending to low water mark, on such navigable streams, bays and harbors.

p. 347, Sec. 651a. Beds and bottoms of waters and shell fish therein declared to be property of the state.

Art. 2, Sec. 454, p. 238; Sec. 455, p. 239, Revised Statutes of Florida, 1892.

(This was originally Chap. 791, Secs. 1 and 2, Laws of Florida, 1856).

Iowa. Supplement Code of Iowa, Annotated, p. 1215, Chapter 2-B, Of Meandered Lakes and Lake Beds, Secs. 2900a19 to 2900a27.

Sec. 2900a19, Survey and Sale Authorized.

Kansas. General Statutes of Kansas, 1915, p. 1756, Chapter 101, Rivers and Islands; Secs. 8723 to 8754.

Arkansas. Digest of the Statutes of Arkansas, Kirby & Castle—1916, p. 1319, Chap. 109, II, Swamp and Overflowed Lands; (6), Secs. 5536, et seq.

III, Sale of Sand or Gravel From Beds of Navigable Streams, etc., Sects. 5607, et seq.

Oklahoma. Bunns Ann. Supp. to Rev. Laws of Oklahoma, 1910, p. 935, Sec. 7170.

(This was originally Chap. 118, Session Laws of Oklahoma, 1910, a bill providing for the manner and procedure in leasing and managing the public lands of the state.)

Minnesota. General Statutes of Minnesota, 1913, p. 1191, Ch. 44, also pp. 1203, 1448, 1971.

p. 1191, Chapter 44, Secs. 5480 to 5522, Drainage, State Drainage Commission.

p. 1203, Secs. 5523, et. seq., County Ditches

p. 1971, Sec. 8949, Draining Meandered Lakes, etc., (under title of crimes against property) providing that it shall be a misdemeanor for any per-

son to drain, cause to be drained or to attempt to drain in any manner any lake, pond or body of water which shall have been meandered and its metes and bounds established by the government of the United States.

p. 1170, Secs. 5386, et. seq., Reclamation Board, relating to reclamation and sale of swamp and cut over land.

Some of the cases cited in this brief, construe some of the foregoing statutes.

We assume that it is not improper to call to the attention of this court the state's public documents. This court has frequently cited the opinions of the Attorney General of the United States or called attention to their contents. A special session of the Legislature of the State of Oregon was held in 1920 to pass remedial legislation, and at this session Hon. George M. Brown who was attorney general of the state of Oregon and later a Justice of the Supreme Court of the State of Oregon, gave an opinion to the chairman of the committee on Commerce and Navigation of the Legislature. It was pursuant to a public demand that state policy be declared as to a large number of the lakes situated in Oregon. The legislation was finally enacted in 1921 which is included in the amended answer of the defendant herein. We trust that the citing of the opinion of Attorney General George M. Brown will assist this court in understanding just what it was sought to accomplish, at least in part, by the legislation stated in the defendant's answer. The opinion given by the Attorney General is set forth in the *Supplement* to this Brief, marked Appendix G. This opinion well sets forth the reasons why we urge that the legislation of Oregon is constitutional.

If the state does not have power to dispose of lake bed lands under the 1921 and 1923 legislation, on a theory of holding in a governmental or sovereign capacity instead of in a proprietary capacity, such fact is for its own courts to determine. It does not interfere with constitutionality of the remainder of the act. Section 5 of the 1921 legislation contains the well known saving clause. (Report, Supplement, p. ix) Such a clause is valid. Standard Lumber Co. vs. Pierce, 112 Or. 314, 340-343, 228 Pac. 812, 820-821 (13-15). Such a clause would permit the state to assert ownership and keep possession and control as a sovereign, and yet not justify it in conveying any portion of the bed in a proprietary capacity. What distinctions should be made between the State's governmental and proprietary powers may not be necessary to inquire into here; such questions may properly be left for determination by the courts when the occasion arises for it.

State statutes are not held unconstitutional as an interference with interstate commerce, when upon the face of such statutes there is no apparent attempt to make them apply to such commerce; they are held merely *inapplicable* and *unenforcible* as applied to such commerce. So in this case, the Special Master, instead of condemning the statutes, should have held, in the event the lakes are non-navigable, that the United States retains so much of the beds as front public lands which have not been conveyed, and that Oregon's legislation is simply *inapplicable* thereto. Within the doctrines laid down by this court, the United States is no longer concerned with the ownership of the beds of lakes fronting the granted uplands, as that is a matter of local law, involving only the

State of Oregon and the upland owners and settlers. Defendant's Exceptions 122-128 are well taken.

(7) Was the Executive Order of August 18, 1908, Valid as and from that Date?

(Report of the Special Master, p. 61)

Exceptions 129-130

Under this heading the Special Master comes to the conclusion that under United States vs. Midwest Oil Co., 236 U. S. 459, 466, 470, that the Executive Order was valid.

The proclamation of 1908, was made at a time prior to the treaty with Canada and at a time when migratory bird legislation was invalid. Geer vs. Connecticut, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600; United States vs. Shauver, 214 Fed. 154; United States vs. McCullagh, 221 Fed. 288. To attempt to reserve lands for public purpose when *no legislation as to such purpose could be enacted is a far reaching attempt to exert executive power.* Such legislation in any event could not affect lands theretofore conveyed by the United States by unrestricted grants and patents, and could not affect lands as to which valid settlement rights had theretofore been initiated and which were followed up by the issuance of patents to such lands and where all of the grants and patents had no reservations or restrictions contained therein.

(8) Did the School Lands (62.76 acres bordering on the Sand Reef Division and 160.87 acres (20.27 acres plus 140.60 acres) on the Harney Lake Division) the Surveys Whereof were Approved Subsequent to the Executive Order, August 18, 1908, Pass to Oregon or are they Still the Property of the United States (United States v. Morrison, supra)?

(Report of the Special Master, p. 62)
Exceptions 129-138

The Special Master holds that lots 1, 2 and 3 of Sec. 36, T. 26 S., R. 30, North of Malheur Lake in the Sand Reef Division, and Lot 4 of the same section in the Harney Lake Division, did not pass to the State of Oregon inasmuch as the survey thereof was in 1912 and the Executive Order making a reservation was issued in 1908, prior thereto. Lots 1, 2, 3 and 4 of Sec. 36, T. 27 S., R. 29½ E., as stated by the Special Master in Appendix 8 of his Report opposite page 16, were likewise approved after the Executive Order. Accordingly the Special Master held that the Executive Order was valid and issued prior to this survey or approval thereof, and therefore Oregon did not acquire title thereto as school lands.

As to this contention the State of Oregon submits to the Court that inasmuch as land divisions, namely townships, sections, quarter sections and lots upon meandered lines, are created and *come into existence only when surveyed*, that the language of a reservation order withdrawing lands from public entry and making a reservation which does not withdraw *eo nomine* unsurveyed lands but only *legal subdivisions* cannot be construed to be a withdrawal of lands bordering a lake which have not yet been surveyed. The court will note from the Executive Order, a copy

of which is inserted opposite page 1 of the Report of the Special Master, that as to lands on the shore line of these lakes the reservation was only of the "all smallest legal subdivisions which touch the shore lines of lakes Malheur and Harney and the streams and waters connecting those lakes." There was further attempted reservation of islands and unsurveyed lands within the meander lines of the lakes but as noted with reference to shore lands the reservation is only of "all smallest legal subdivision." Therefore it should be apparent that if at that time there was *not in existence legal subdivisions* on the northeasterly corner of Harney Lake in the Sand Reef and Harney Lake Divisions as stated, and in the southeast corner of Harney Lake in the Harney Lake Division as stated, *because such lands were not then surveyed*, it would seem to necessarily follow that those unsurveyed lands were not reserved by the Executive Order, and accordingly when these lands were subsequently surveyed in 1912, there being no reservations thereof, they did pass to the State of Oregon as school lands. The State of Oregon states that the Executive Order of August 18, 1908, should be held invalid, and *Exceptions* 129 *to* 138 well taken, and this court should hold that the unsurveyed lands above described on the shores of Harney Lake and the Sand Reef Division were not withdrawn but that they passed to the State of Oregon as school lands when they were subsequently surveyed in 1912.

(9) In View (1) of the Absence from the Case as Parties of (a) the Upland Proprietors and (b) the "settlers" within the Meander Line Boundary, and that (2) Oregon Takes Positions Inconsistent with Claims that they might be Expected to Make, how far Should the Court Proceed in the making of a Decree Without their Presence?

(Report of the Special Master, p. 63)

Exceptions 82, 83, 102, 103, 104, 135, 136, 137, 138

The Special Master in his Report, adopting the theory that the common law of England is the common law of Oregon, holds that the upland owners own to the center of the lake. However as a corollary he presents the law upon the proposition that if he is in error in so construing the law of Oregon that in any event the United States retains title to the bed of a non-navigable lake, where it has granted uplands and accordingly the upland owners cannot *appropriately* be brought into this case. Though he holds that the State of Oregon and the upland proprietors are the owners of the beds of the Narrows and of Mud Lake he does not seek to apportion the beds in accordance with Hardin vs. Jordan or any other approved rule of apportionment for the reason that the upland proprietors are not parties to the suit. (Report, p. 137, subd. 17). The inevitable logic of the Master's Opinion is that the upland owners and the United States, plaintiff herein, are the owners of the bed of Malheur Lake in such respective aliquot proportions according to approved methods of apportionment stated in Hardin vs. Jordan, as the upland ownership of the United States bears to the upland ownership of private riparian proprietors, but he states as neither said patentees nor their successors in interest (except insofar as the State of Oregon is

a succssor in interest of some of the patentees) are parties to this suit, no determination is herein made in respect of the rights, titles and interests acquired by such patentees in the areas within the mander line boundary or their successors in interest. (Report, p. 136, subd. 14). The Special Master further provides that his proposed decree if adopted by this court shall neither bind nor inure to the benefit of third persons not parties to this suit except the patentees of the United States of America as such, and their successors in interest, who shall have the benefit of the decree as against the claims of the State of Oregon in conflict with the titles of the United States determined herein and existing prior to the disposal of the uplands. (Report, p. 137, subd. 18). The Special Master stated it would be *seemingly inappropriate* for this court to bring in the upland proprietors and the settlers. (Report, p. 63). The Special Master interprets the decree and opinion of this court in United States vs. Utah, 283 U. S. 800-803, as adjudicating the right of the United States to enjoin defendant, the State of Utah, from asserting title to those parts of the bed of the river which had been *conveyed* by the United States *before suit brought*. (Report, p. 65).

The Master states that the plaintiff should be permitted on its own behalf and on *behalf of its grantees* to obtain a decree against Oregon as to the basic facts upon which validity and sufficiency of its grants would depend. (Report, p. 65), and the Master states it would therefore seem appropriate to decide the above questions and connected questions as far as they may be and leave the controversy with (a) the upland proprietors and (b) the settlers

> "To be determined in later litigation either in the federal courts for Oregon or in the state courts." (Report, p. 64),

and accordingly the Special Master arrives at the conclusion that the United States "may be properly awarded a decree that it once owned all the area involved and still is the owner thereof except as to such portions as have been granted under the Act of Admission or by patent." (Report, p. 65).

All of these findings and conclusions of the Special Master are challenged under Defendant's Exceptions 82, 83, 102, 103, 104, 134-138. See also Exceptions 140, 141, 143 and 144. It is perfectly apparent from reading the Report of the Special Master that unless the upland owners, the riparian proprietors, and the claimants to the beds of the lakes are brought into this case, the real purpose for which this case has been instituted may prove unavailing. It is perfectly apparent from what has been shown in this brief that there is urgent necessity that the law we finally determined with reference to the title to the beds of inland non-navigable lakes. The question was not squarely presented to this court in Whittaker vs. McBride nor the Marshall Dental Company case but the question is now squarely before the court and it is imperative that the question be finally settled. The State of Oregon realizes the importance of this and attempted to provide from a tribunal under the legislation referred to in the Supplement to the Report of the Special Master, p. iii-v. A tribunal was sought to be invoked wherein the rights of the State of Oregon the upland proprietors, the settlers and the United States could all be settled in one suit. We have seen elsewhere in this Brief that a crying necessity for a

settlement of this question has arisen as shown by the attitude of the State of Iowa and the decisions in many states. It is not fit and proper that a one-sided, incomplete decision be rendered in this case, nor is it proper that the rights of the State of Oregon against the settlers and the riparian owners be left undertermined, nor is it right that the United States should have the privilege to attempt to pick off one by one the poverty stricken riparian owners and settlers out in Harney county as suggested in the opinion of William D. Mitchell to the President which resulted in the veto of the legislation referred to. The United States government has refused to co-operate with the State of Oregon in attempting to get the entire controversy settled. As shown by the argument before the Special Master the State of Oregon insisted that the riparian owners and the settlers or squatters inside the lake should be brought into this case. The question can now come directly before this court for determination. Why it would be *inappropriate* to bring in such persons we cannot conceive. In the case of Oklahoma vs. Texas the court *appointed* a receiver over the *res* thereby taking into the jurisdiction of the court the entire controversy, brought in all the private parties, and the case was finally settled on its merits with all necessary parties before the court. The same procedure should be followed in the case at bar. It would be nothing less than a tragedy after the many years which have elapsed since Hardin vs. Jordan was decided, with the United States now claiming title to the beds of all non-navigable lakes in the United States, which it can do if it should succeed in the case at bar, to have the real questions left undecided because the

court is unable to make a final determination due to the absence of the riparian owners and the settlers and squatters. If it was *appropriate* to bring in such private parties in the case of Oklahoma vs. Texas, and in which case the United States intervened, it is certainly appropriate and we believe indispensible that they should be brought in in the case at bar.

The Special Master in arriving at his decision interprets the decision by this court in United States vs. Utah as giving this court a right to quiet its title in behalf of itself and *its grantees*, namely grantees prior to the commencement of the suit. (Report, p. 65). No such construction can be given to that case. A cursory examination of the Bill of Complaint in the case of United States vs. Utah, paragraphs 2 and 3, also Exhibit A, page 17, attached to the Complaint, shows that in that case the United States did not attempt to quiet title in itself and the grantees to whom it had patented uplands, *prior to* the commencement of the suit. As a matter of fact the Complaint and Exhibit A attached thereto conclusively show that the United States was *not making any claim* to any lands in the bed of the river *fronting the uplands* which it had patented to private parties before the commencement of that suit. The Complaint expressly excepts from the operation of the suit, and the operation of its decree the lands of the mineral claimants in the bed of the river and that portion of the bed fronting the upland owners on that stream. The averments of the Bill of Complaint in United States vs. Utah show that the United States was seeking to quiet title only to so much of the beds of the rivers involved as were then in front of unpatented vacant public lands. The Special Master, as stated

in Defendant's Exception 140 herein, erred in construing the case of United States vs. Utah as being an authority permitting the United States to obtain a decree quieting title on its behalf and on behalf of its *grantees*, to-wit, grantees to whom it had conveyed or patented lands prior to the commencement of the suit. That expression in the Utah case and the effect of the decree in the light of the pleadings in that case can only be construed to mean the quieting of the title of the United States in itself *and its subsequent grantees*, to uplands then owned by the United States fronting the beds of the streams involved, viz., non-navigable waters.

The Special Master herein may have been further influenced in his decree by the fact that in the Marshall Dental Company case the State of Iowa was given the right by virtue of its sovereignty to quiet title to the bed of a non-navigable lake against one who had no title. We assert it is a far cry from that decision to the present conclusion of the Master recommending a decree in favor of the United States herein against the State of Oregon and in favor of all of the grantees and patentees of the United States, on grants and patents issued prior to this suit.

To justify any decree such as the Master recommends in this case is a nullification of what this court said in Wear vs. Kansas, Oklahoma vs. Texas and in Brewer-Elliott Oil & Gas Company vs. United States. There is nothing in United States vs. Ladley, 4 Fed. Supp. 580, which justifies any such conclusion. That case is utterly distinguishable upon the merest cursory examination of the facts involved therein. If the Master's opinion is followed in this case the result of this expensive litigation which has been years

in preparation and which has cost a great amount of money will be fruitless. Every consideration of justice and public policy and the settlement of land titles requires that this case be completely determined upon its merits, that all necessary and indispensable parties be brought into this court so that we may have a proper and final decree herein at this time. What has been said under this question of law numbered 9 presented by the Special Master is pertinent to proposition No. 10 which we now consider.

(10) Is there Anything in the Case Which Requires the Application of the Rule that a Plaintiff in a Suit to Quiet Title must Recover upon the Strength of his Own Title and not upon the Weakness of the Title of the Defendant?

(Report of the Special Master, p. 64)

Exceptions 139-144

We have read with interest the cases cited by the Special Master seeking to justify his conclusion that the United States in this case has a right to quiet title upon the alleged theory of the weakness of the title of the defendant instead of upon the strength of the title of the plaintiff.

If the lakes involved in this case are navigable of course there is no question that the plaintiff has no title.

If the lakes in this case are held by this court to be non-navigable, then this court will determine whether the United States has lost title thereto at least to

everything in the Narrows and in Mud Lake and to all that portion of the beds of the other Divisions fronting uplands which have been granted without reservations or restrictions, whether according to the ordinary patent referring to an official plat of record or pursuant to the School Act involving Section 36, or indemnity lands taken elsewhere because of fractional school sections or the meander line.

The cases cited by the Special Master, and substantially all cases that we have been able to find, set forth the universal rule that the *plaintiff must recover upon the strength of his own title and not upon the weakness of the title of the defendant.*

The Special Master cites the Rhode Island vs. Massachusetts, 14 Pet. 210, 257 (Report, p. 65), wherein this court announces the rule that in controversies between sovereigns it is the duty of the court to mould the rules of chancery practice and pleading, in such a manner as to bring the case to a final hearing on its own merits, and the case of Virginia vs. West Virginia, 220, U. S. 1, 27, wherein this court stated it would spend no time on objections as to multifariousness, laches, and the like, *except so far as they affect the merits.* The Special Master misreads as we contend the case of United States vs. Utah, interpreting that case to hold that this court had the right to quiet title to the river bed where it was non-navigable and to enjoin Utah from asserting title thereto "adverse to the United States of America, *or its grantees,*" the Master saying "presumably before suit brought." (Report, p. 65). As we have shown, the Master's interpretation is incorrect because the words "or its grantees" under the pleadings in that case indisputably refer to grantees to lands

the United States still owned and which were involved in the suit, and hence subsequent grantees.

We are aware of no rule or authority justifying a party quieting title in behalf of itself to lands which it has disposed of. It would be an unheard of rule of practice and procedure as well as of substantive law to permit a party to quiet title in himself and his grantee to lands which he had theretofore conveyed. It would be a remarkable situation in the law if a vendor after he had conveyed all his interest in lands fronting waters could make a claim to the bed of the waters in front of such land conveyed by him, and *unsuccessful in establishing his own claim* to the bed underneath such waters, would yet be permitted to *quiet title in his vendee.* This would be a remarkable juggling of the rights of the vendee by a vendor who had lost title prior to suit brought. We find nothing in the decisions which justify any such conclusion. The authorities cited by the Master we believe do not warrant any such decision. There are no unique requirements of the case which bring into operation any exception to the rule, if one is needed as stated by the Special Master (Report, p. 65), and we believe there is no exception to the rule.

The state of Illinois did not find itself bound by the decision of this court in Hardin vs. Jordan in giving the bed to Mrs. Hardin. It held that under the local law she did not have any title. We assert, with all due respect to this court, that it has stated a rule of law, which makes it impossible for the court to declare that the upland owners own to the center of the lake and not the State of Oregon, thereby preventing the State of Oregon from asserting against its own citizens that it and not they own the bed of

the lakes. It cannot give title to the riparian owner against the State of Oregon, and certainly not in a case in which the riparian owners are not even in court to assert or set up what they claim their rights are.

In Freeman on Judgments, (Fifth Ed.) Sec. 436a, p. 955-6, the same author cited by the Special Master, (Report, p. 65) it is said:

> "But it seems to be certain that the courts dislike to proceed in the absence of any of the parties in interest, and that they will *only fail* to order all parties to be brought before them in *extreme cases*, where the difficulty of proceeding would otherwise be very great."

There is no difficulty in bringing in the upland owners and settlers here.

So the State of Oregon insists and asserts that the rule that the plaintiff in a suit to quiet title must recover upon the strength of his own title applies. Upon the very reasoning of the Special Master in this case, if his conclusion is correct that the lakes involved are non-navigable, it is clear that the plaintiff could not recover upon a theory that the upland owner owns to the center of a lake, which would be a specific denial of any title in the plaintiff. If this court establishes the rule that so far as the State of Oregon is concerned the local law must prevail in front of lands which have been granted or patented without reservations or restrictions, then in such cases the United States has no title to the beds fronting the granted uplands on Malheur Lake, the Sand Reef Division or Harney Lake, and it is not even an upland owner on the Narrows or Mud Lake.

A remarkable anomaly is found in this case by the recommendation of a decree quieting title to that

portion of the Narrows Division which the Master on said Appendix 5 opposite p. 9 of the Report, has marked A, situated easterly of the Narrows Bridge and which he holds is a non-navigable stream. He recommends a decree quieting title in the United States against the State of Oregon to that area, even though the United States does not own a foot of land on the Narrows Division.

Likewise the Special Master recommends a decree quieting title in the United States against the State of Oregon to Mud Lake, except that which fronts in a pie-shaped form to the center of the lake, the area owned by Oregon on the boundary line, even though here also the United States does not own a foot of upland on the Lake.

We respectfully submit that the conclusion of the Special Master upon this subject is unsound.

Conclusions of Law

(Report of the Special Master, p. 132)

Exception 145

For the reasons above stated the conclusions of the Special Master are erroneous.

Counterclaim of the State of Oregon
(Report of the Special Master, p. 137).

Exception 146

For the reasons set forth in this Brief the Counterclaim of the State of Oregon quieting its title against the United States of America should be allowed, and the relief prayed for by the State of Oregon granted.

Respectfully submitted,

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Attorney General of Oregon

L. A. LILJEQVIST,
Assistant Attorney General.

TRAPPING AND FUR BEARING TRADE

Exception 14

Baker, Abs. p. 715, l. 34. Has seen trappers on Malheur Lake, going from one trap to another on the ice in the winter time.

Benson, Geo. M., Game Warden, Abs. p. 722-724. Benson stated he located in 1909 on the south side of Malheur Lake. He and Frank Caldwell trapped for muskrats and sold them. They got 40 cents for them on an average. That year they had about six thousand of the rats and 78 mink; the mink sold for $5.00 apiece. Other persons were trapping at that time; ten or twelve, trapping for the same animals. They continued trapping every year after that up to the dry years; they ceased to trap about 1919. As game warden he kept a record for 1918 and 1919. He had a tabulation of the muskrats and other fur bearing animals taken by himself and others during these years. The total number of muskrats trapped were 8,477; mink 131; skunks 15; weasels 8 and coyotes 3. The skunk furs sold for $3.00; the weasel furs for $1.25 and the coyotes for $6.00. The price usually obtained for muskrats was 40 cents and the highest price $3.00, and $5.00 for the mink up to $7.00. A few otter caught averaged about $20.00 a skin. The animals were caught in steel traps set in the runways in the tule area of the lake, except in the extreme west. All of the islands where there were tules there were muskrats; there were muskrats throughout the entire western area of Malheur Lake north to the Silvies. There were muskrats in the entire area west of that

towards the Narrows when the water stayed there. The greatest number of muskrats was around the main body of the open water; all around the edges; around the tule border, around Cole Island, not many around Pelican Island. There were a few sloughs there around the edges of the tules on the border of the lake in Township 25 South, Range 32½ East, north of the lake, that had a few muskrats on. There were muskrats in the area along the higher portion that goes out from Graves Ridge or Graves' Island. There were lots of muskrats out in the area northerly or westerly to the mouth of the Blitzen River. In the tule area easterly of Graves' Ridge and northerly from Benson's cabin there were muskrats, and from there if there was water, they went all the way through to Mud Lake. If there was water in the westerly part of Malheur Lake you would have muskrats all through that area. They did the hunting in the fall and spring and used boats altogether in setting the traps and getting the muskrats.

The muskrat skins were dried and packed in a frame or crate. After they were gotten off the lake they were baled and taken to market on a team to Crane; sometimes they were shipped to Ontario. There was no public road leading from Malheur Lake to the railroads at that time which later came into Crane. There were roads leading from Malheur Lake to Crane; one known as the Lane Road on the Meldrum line which went to Ontario, another branch went to Crane and the other part of this Lane Road went past Springer's Spring and extended across The Narrows and then to Burns

and the OO Ranch. From Burns there was a road to Bend and to Portland. There was a road out towards Pendleton. There has been a railroad at Bend for a good many years. When he took the muskrats from the lake and put them into the boat and brought them to the cabin, skinned them and dried them and baled them, he was able to go from the cabin to a road immediately adjoining the lake and took them to public market and railroad. There were a vast number of ducks on the Game Preserve. He took some of the skins which be obtained by trapping to the railroad point to ship. He drove to Parma, Idaho, from the lakes, and shipped them there. Other fellows shipped them by express from Lawen where they had to go on the stage line. He shipped some at the Narrows and put them on the stage line.

Bunyard, Abs. p. 716, l. 43. He always trapped for muskrats, mostly, in the winter time. P. 717, l. 1-7. A muskrat had to have a house built out of the water; it had to be high enough so that they could go down underneath in the water and come up in the top of it where it was dry above the water line. Houses built of tules, like a shock of hay. P. 717, l. 11-13. They stayed in the tule area. l. 15-17. There were a lot of muskrats caught and they got 5 cents a skin in those days. l. 34. He trapped in the northern end of Malheur lake; he did not trap westerly of the Silvies or Blitzen rivers.

Caldwell, Abs. p. 714, l. 21, 23. There were lots of muskrat houses in Malheur Lake in the early days. There were lots of coons on the lakes and lots of beaver and otter on the river.

Appendix A

Comegys, Abs. p. 982, l. 15-20; p. 719, l. 25-27. Stayed with his cousin Reinhart in 1894 and 1895 on Blitzen River and went out into Malheur Lake although not very far in the open water. They trapped principally for muskrats and mink, around the edges in the tules. Used a homemade boat.

Dunn, T. T., Abs. p. 720, l. 14-17. His brother trapped for muskrats on Malheur Lake and on the Spring Branch. (The stream which leads from Springer's Spring and runs into the Blitzen River.)

Farrier, Abs. p. 720, l. 20. Trapped for three winters on Malheur Lake.

Finley, Naturalist, Abs. p. 960-963. He is the Oregon naturalist, who was largely responsible for President Roosevelt issuing the reservation proclamation. Abs. p. 960, l. 39-43. He considers the area has great economic value. Abs. p. 961. In 1908 when he was there there were a great many muskrats; they camped one night on a muskrat house. From the standpoint of fur bearing animals, there was quite a bit of fur produced through that area. One man with a few traps had just trapped a thousand muskrats out of the lake, and the lake produced a good many muskrats. Abs. p. 961, l. From an esthetic standpoint it had a large value as an unusual outdoor resort for birds and animal life. Abs. p. 962, l. 6-7.

Gardner, Abs. p. 715, l. 5-25. Trapped in Malheur Lake in 1883 for muskrats and the like, in the fall of the year, after it freezes, and in the months with the letter "r" in the name of the month. They trapped all over Malheur Lake, on Pelican and Cole Islands, in the channel near Scott Haley's place,

and up the Silvies to the Showen place. They went all around, one point today and another tomorrow. He trapped a lot in the early days, and a lot of other people trapped too.

He stated the industry did not become important. This is the sentence quoted by the Special Master in his Report, p. 20. (The State claims this is a conclusion of the witness, not borne out by his own testimony, and overwhelmingly contradicted by the other witnesses.) P. 965, l. 39. They used boats in the wintertime trapping. (Evidently before it froze.) P. 353, l. 18-21. Has trapped Malheur Lake in March all the way up the channel.

Hamilton, Abs. p. 716, l. 13. It was a grand sight in there among the tules in Malheur Lake. There were plenty of birds and muskrats.

Hanley, Abs. p. 718, l. 40-42. A vast quantity of muskrats bred and lived in Malheur Lake until just recently when it dried up. In the eighties, the lake seemed to be plumb full of muskrat nests, and we had to watch out for them in riding on the ice. There were only one or two trappers at that time. P. 719, l. 1-8. The fur was classed as good fur. There has been a big fur business there. P. 1004, l. 25-29. The trapping of furs and selling them constituted commerce.

Heinz, Abs. p. 997, l. 5, 32. Used a 14 foot boat with a square back, and put a 1½ horsepower engine in it. Boat was 2 feet high. P. 998, l. 41-42. Propeller was 11 inches high and was under water. It was a marine motor. P. 997, l. 7-13. Do not know how much water boat drew. According to how it was loaded. In running trap strings carried around

50 to 60 traps, sometimes 75. l. 27-29. Most of the places floated along easily, once in a while struck a shallow place, then poled out to deeper water. P. 998, l. 1. Used pole to shove off of mud or sand bar when he got stuck. Wheel sometimes fouled with weeds. l. 11-14. Did their trapping in fall and used straight through from 1911 to 1918. l. 15-20. Other trappers were in there but none except Game Warden Benson used a motor boat. l. 26-37. Did their trapping west and south of his father's place, in the edge of the tules, down to Doc Graves' place. l. 39. Trapped once in spring, but usually not in spring as game warden wouldn't let them do so. l. 42-43. Did not have much trouble with weeds in spring. l. 44-47. Quite a few channels west of the west fork of the Silvies, and would follow along the channels and set traps in different places where they went with the boat. P. 997, l. 23-26. It was too far to travel with a row boat and they were going out too far to row a boat. P. 330, l. There were no islands down there where he trapped, west of Cole Island. Sometimes when the water was low there were islands, but if it was high water there were no islands. When he was trapping, he believes a few little knolls stuck up there. P. 957, l. 14-42. He sold the furs at different prices, from 5 cents to $1.00 apiece. In 1918 he got $1.00 for each fur. The price before that ran from 30 to 50 cents; the young kittens sold for 5 cents. When they first started trapping they got 15 cents a fur. The greatest number of skins he took in one year was about 1500, this was in 1918. After that the lake dried

up and he could not get a permit to trap. Thinks the muskrats will come back with the water. He sometimes obtained as many as 75 skins a day.

Hibbard, Naturalist, Abs. p. 952, l. 40-47; p. 953, l. 1-7, 12-27; p. 955, l. 44-48; p. 956, l. 1-40; gives an excellent summary of the economic value of the area involved. P. 719, l. 38-45; p. 720, l. 1-11. Prior to the last nine years, when the water became slack, a good many muskrats were caught, it is the animal of economic value. They have now disappeared; the government has forbidden trapping and there are not many now to take, anyway. Though he has no record before government kept one, before the last period when trapping slackened up, several thousand pelts were taken out each year.

Jewett, Naturalist, Abs. p. 957-960, gives an excellent picture of the economic value of the area involved. P. 960, l. 13-25. Malheur Lake in 1912 produced a large revenue through the sale of muskrats and other fur pelts. In 1913-1914, 4400 muskrats were taken according to records seen by witnesses. In 1912 skins worth about 50 cents apiece, on an average. The market fluctuates. Trapping has been stopped due to decrease in recent years.

Marshall, A. L., Abs. p. 720, l. 24-27. Witness has trapped for muskrats around Cole Island near where he lives.

Sizemore, Abs. p. 970, l. 18-25. Witness has seen a lot of trapping in Malheur Lake. The two Weir brothers trapped over the lake for years as well as Hardisty who ran over the lake with a boat more than any other man. Some of them used a sail on their boat.

Appendix A

Whiting, Abs. p. 714, l. 29. There were not so many muskrats in the early days as later when the water receded enough so that they could have houses. The muskrat has to get out of the water the same as everybody else to sleep and they built their muskrat houses out of tules two or three feet high, and the muskrats came out of the water into those tule houses.

DEPTHS

Exception 18 (*subd. b*)

(Elevations according to contour maps, Plaintiff's Exhibits 3 and 4, above mean sea level are stated in parentheses, e. g. (4094).)

Ausmus, Abs. p. 630, l. 15. Off Cane Island. (4096.)

Benson, Abs. p. 1000, l. 10. Off Pelican Island east in 1922. (4093 plus.) P. 620, l. 40. Graves ridge in 1922. (4093 plus.)

Brandon, Abs. p. 759, l. 10-14. Channel at Narrows. (4099 plus.)

Bunyard, Abs. p. 509, l. 43-47. Water foot to 20 inches above roots of tules. P. 510, l. 1-2. Water foot to 20 inches above roots of tules. P. 626, l. 40. Foot or two of water and five feet of mud.

Caldwell, Abs. p. 622, l. 4-10. Three or four feet of water in tules where horses broke through ice.

Campbell, Abs. p. 629, l. 9. Covered his lands from half an inch to 3 feet. (4094 to 4097.)

Darsey, Abs. p. 689, l. 12-14. Channel separating Pelican Island from mainland. (4094.5 to 4097.)

Finley, Abs. p. 630, l. 25-35. Through tule area from 5 or 6 feet deep, to 2½, 3 or 4 feet.

Gibson, Abs. p. 627, l. 3. Water two feet deep on lower part of his place next to lake. (4095.)

Graves, Abs. p. 592, l. 41-46. Water came to practically same place every year. P. 619, l. 10-12; 1922 trip with party of state and government men, drove down Graves Island. P. 619, l. 23-25. Drove through water a couple of miles on Graves Island. (4094 plus.) P. 629, l. 31-39. Third of island under water. (4094 plus.)

Appendix B

Hembree, Abs. p. 625, l. 35. Up channel to lake from Narrows. 5 to 6 feet of water. (4096, 4097.)

Hibbard, Abs. p. 580, l. 1-13. Tules grew in water from 6 inches to 3 feet. (See Pecore, Abs. p. 674, l. 43-44. Tules do not grow below elevation 4091.) (See Jessup Report, Plaintiff's Exhibit 52, pp. 83-84. Tules grow in water from 3.5 to 4.5 feet.) (See Defendant's Exhibit X-6, Cooper Dodge Survey of 1914.) P. 627, l. 7-15. Water 5 to 5.5 feet deep. (4094.5.) P. 996, l. 35-45. Water 5.5 feet In 1922. (4094.5.)

Huffman, Abs. p. 577, l. 18. 6 inches to 1 foot over Huffman place in lake. (4095.)

Jessup, Abs. p. 963, l. 22-25. When water rose over 4106 it would flow out of Malheur Gap. (Early government maps showed water of Malheur River flowing from Malheur Lake through the gap into Snake River. P. 1079, l. 18. The differences between the elevations shown by state surveys (Defendant's Exhibit X-1, Abs. pp. 862, 865-868; Exhibit X-2, Abs. p. 873, l. 4-8, p. 874-875, Pecore's comparative tables of the state and government surveys) are not very serious or large. P. 1071, l. 38-40. Water elevations at the Narrows on August 13, 1913. (4093.89 to 4093.99.)

Kilburn, Abs. p. 625, l. 20. When working with cattle on ice in western part of Malheur Lake, water from cinch of horse to over horses's back. Elevations of lake in this area as shown by contour maps is about 4091, a few places 4090. So elevation of water would be from 4093 to 4095, in winter.

Lucas, Abs. p. 359, l. 40-44. Water over length of oar.

Martin, Abs. p. 628, l. 10. 300 or 400 yards west of

Pelican Island water up to Martin's chest. (4095.)

Ortego, Abs. p. 369, l. 34-37. Big body of water between Pelican Island and Windy Point; and westerly of Pelican Island toward Narrows mostly all open but some tules. P. 367, l. 40-47. Some of sloughs in western part of lake deep enough to swim a horse in. (4096.)

Pecore, Abs. p. 595, l. 45. Ausmus, Otley and Hayes grain field marked on Exhibit 3.

Peterson, Abs. p. 381, l. 6-7. Western half of lake had quite a little water at times. After getting out from tules along edge, considerable space free of tules.

Reinemann, Abs. p. 531, l. 15. Went through trail in western part of lake. Water to running gears of wagon. (4093.) P. 627, l. 19. Same.

Sizemore, Abs. p. 459, l. 47. Channel between lakes 15 or 20 feet deep. (Lowest elevation of bed at Narrows is below 4089 contour. Pecore, Abs. p. 755, l. 7-8). Hence water would be from elevation 4103 to 4108. P. 460, l. 1-2. Channel between Malheur and Harney has been awfully deep.

Smith, Abs. p. 788. Water on his lands from Mud Lake which lands had elevation of 4092 and 4093. P. 789, l. 34-36. Ware's lands covered with lake waters. (4093 to 4094.)

Smyth, Abs. p. 631, l. 23-29. Forded Blitzen in 1853 in October.

Thompson, Abs. p. 606, l. 14. In wet years when have a lot of precipitation it is a problem to get rid of the water. Sometimes could not hay at Lawen until middle of August. P. 625, l. 10. Horse broke through ice and water was midsides to a horse. (4094 in channels.)

Appendix B

Turner, Abs. p. 535, l. 11-15. Amount of water depended on how much snow fell in mountains.

Vickers, Abs. p. 622, l. 24. Broke through ice, water midsides at places. (4094.)

Whiting, Abs. p. 349, l. 43-45. Tules along sides of lake which made it difficult to get into lake. Largest body of open water east of Silvies to Windy Point. P. 714, l. 28-34. More muskrats after water receded enough so that they could build houses out of tules, and come out of the water into the houses.

Witzel, Abs. p. 626, l. 22. Horses broke through ice and water came up midsides. Cattle also drowned and water deep enough to go over their backs. (4096.)

ELEVATIONS

[Elevations of Lake Surface in Parentheses ( )]

Exception 18, *subd. c*

Ausmus, Abs. p. 630, l. 15. Cane Island. (4094.)

Biggs, Abs. p. 606, l. 31, 38; p. 607, l. 1-4. Covered his lands. (4093, 4095 and 4096.)

Brown, Abs. p. 436, l. 26; p. 488, l. 46. Riley place, sometimes known as Hutchison place. (4093 plus.)

Bunyard, Abs. p. 598, l. 35-44. Simmons place. (4094 and 4097.) P. 670, l. 7. Hill ranch. (4094 plus.)

Campbell, Abs. p. 553, l. 42; p. 554, l. 23-28; p. 555, l. 14-17; p. 629, l. 11. Campbell's squatters claim. (4094.)

Carey, Abs. p. 562, l. 4; p. 563, l. 5, 42; p. 481, l. 19; p. 488, l. 1; p. 562, l.5. Carey place. (4095.) P. 562, l. 20. Jordan place. (4094, 4095.)

Catterson, Frank, Abs. p. 285, l. 26; p. 286, l. 10-22; p. 512, l. 5-9. Spurlock place. (4093, 4094, 4095.)

Catterson, Ralph, Abs. p. 582, l. 39; p. 581, l. 10-14; p. 582, l. 25-27. Spurlock place. (4093, 4094, 4095.)

Cawlfield, Abs. p. 547, l. 1-3. Near Swan Lake. (4093 plus.) P. 547, l. 29-32. Cawlfield place involved in Cawlfield vs. Smyth, 69 Or. 41, (Plaintiff's Exhibit 59, Abs. p. 247- 261; Defendant's Exhibit X-4, Abs. p. 246-247. (4093, 4094.) P. 547, l. 40-40. Simmons place. (4094, 4097.) P. 547, l.47. McCoy place. P. 548, l. 4-6. Reinemann place. (4097 plus.) P. 544, l. 46; p. 545, l. 1-8, 10-15, 20. Cawlfield place, supra. P. 546, l. 1-4, 14-17. Near Swan Lake. (4093 plus.)

Clark, Abs. p. 503, l. 25-48. Ruh place. (4093 plus.)

Appendix G

Comegys, Abs. p. 777, l. 35; p. 778, l. 1-3, 29. McKenzie place. (4093, 4095.)

Comegys, Abs. p. 526, l. 20. Hill place. (4094 plus.)

Dillman. Abs. p. 585, l. 11-14, 17-22, 33-34, 10-20. Dillman place. (4093 and 4094 plus.)

Dunn, Abs. p. 142, l. 3. Martha Dunn place (4094, 4097.)

Gibson, Abs. p. 564, l. 40; p. 565, l. 10-15, 39-43. Gibson place. (4094 plus.)

Graves, Abs. p. 592, l. 22, 41-43; p. 594, l. 4-6, 10; p. 629, l. 31. Graves ridge or Island. Water covered about 13 of its area and did so in 1922, when a party of state and government men drove over it. (4094 plus.)

Griffin, Abs. p. 610, l. 17; p. 551, l. 17. Griffin place. p. 223, l. 20-33. (4093, 4094.)

Haley, Abs. p. 555, l. 27-29. Haley claim in lake. (4093, 4094.)

Hanley, Abs. p. 518, l. 29-32. Reineman place. Lands appear to have elevation from 4094 to 4097. Hanley saw water up to windows of house.

Heinz, Abs. p. 532, l. 48-49. Heinz place. (4093, 4094.)

Hill, Lyle B., Abs. p. 611, l. 41. Star Buckland place, now Hill Brothers place. (4093, 4094.)

Hill, O. W., Abs. p. 325, l. 34. Ruh place. (4094, 4097.)

Huffman, Abs. p. 576, l. 10. Huffman place. (4093, 4094.)

Kado, Abs. p. 611, l. 38. Benson place. (4093, 4094.)

Loggan, Abs. p. 654, l. 40. Ruh and Adam George place. (4093, 4094.)

Marshall, Abs. p. 478, l. 27. Hill Brothers place within Meander line. (4093, 4094.)

Ortego, Abs. p. 370, l. 20-27. Up to Reineman house. (4094 to 4097.)

Peterson, Abs. p. 604, l. 4, 25, 33. Peterson place. (4093 plus.)

Smith, Abs. p. 788, l. 1-27. Smith place on Mud Lake (4092, 4093.) P. 789, l. 34-35. Ware place on Mud Lake. (4094.)

Spurlock, A. C., Abs. p. 535, l. 44. Spulock place near lake. (4094, 4095.) P. 216, l. 27-34. Charles Spurlock place. (4094, 4095.)

Spurlock, C. A., Abs. p. 537, l. 46; p. 538, l. 14-22. Spurlock place. (4094, 4095.)

Thompson, Abs. p. 405, l. 43; p. 406, l. 5-10. Myrtle Caldwell place. (4098.) P. 791, l. 1-7.

Ware, Abs. p. 790, l. 30, 34-36. Ware place on Mud Lake. (4094.) Also known as Sarah E. Thompson place, and was patented to William E. Bailey.

Whiting, Abs. p. 349, l. 11-16. Low water road from Saddle Butte to Windy Point. Elevation near lake 4094. Could not travel it in spring.

Witzel, Abs. p. 507, l. 29; p. 385, l. 10; p. 384, l. 32-34. John Marshall and Simmons places. (4094 plus.) P. 384, l. 27; p. 193, l. 1-4. Reinemann place. 4094 to 4097.)

Woldenburg, Abs. p. 480, l. 17-30. Woldenburg place lower Ruh place. 4093 to 4097.)

McKenzie, Abs. p. 769, l. 9-11. McKenzie place. (4093 to 4095.)

ENGINEERING DATA

Plaintiff's Evidence

The government survey made by Pecore in 1931 was made on a dry lake bed, hence no opportunity was given to observe the lake in its ordinary condition. Jessup has collected in his report, Plaintiff's Exhibit 52, page 66 data on water elevations. On page 67, table No. 14 he has given elevations at the Narrows, showing sporadic records for the years 1903, 1904, 1905, 1906, 1911, 1912, 1913, 1914, 1916, 1922. These show elevations of the lake at the Narrows during high water seasons from 4093.08 minimum to 4094.97 maximum, or nearly 2 feet above 4093 in spring seasons.

On Table 15, page 68 of said report he gives elevations as shown by the gages at the mouth of the Blitzen, showing reading from the years 1921 to 1931. This record shows an elevation of 4094.91 on June 23, 1921, 4094.53 on May 14-24, 1922, 4094.20 on April 8, 1923, thence dropping of elevation during the dry years between the latter date and 1928 when the water went back to elevation 4093.63. Then dry season resumed until the lake went completely dry in 1931 when this case was tried.

Jessup states at about elevation 4092, due to Graves ridge or Island shown on contour map, Exhibit 3, the water east thereof has no connection with the elevations at the Narrows. An inspection of contour map Exhibit 3, shows that the lowest elevation of Graves ridge, so-called, is between 4091 and 4092. See Pecore, Abs. p. 755, l. 16-25.

Jessup's hydrograph contained in his Report, Figure

16, shows water elevation at the Narrows according to published government data in 1904 of 4095, 4093.4 in 1905, 4093.6 in 1906, 4093.4 in 1903, maximum.

The same figure 16 shows water elevations of Malheur as disclosed by the gages near the mouth of the Blitzen (and easterly of Graves so-called ridge or islands) according to published government data of 4093.2 in 1911, 4094.4 in 1912, 4094.45 in 1913, 4094.8 in 1914, 4093.9 in 1916.

The same figure 16 shows water elevations of Malheur Lake as disclosed by said gage according to unpublished government data of 4094.9 in 1921, 4094.6 in 1922, 4094.25 in 1923, then a dropping down due to said dry years, until in 1928 it gets back to 4093.7, and then it drops down to the dry lake bed in 1931.

The same figure 16 shows water elevations of Malheur Lake as disclosed by said gage according to unpublished data by the State of Oregon, of 4093.8 in 1922.

Accordingly the evidence introduced by the government in the case at bar proves conclusively an elevation of Malheur Lake during high water season, measurably above 4093, ranging from 2/10 of a foot to nearly 2 feet above 4093, the mean elevation of the Neal line.

ENGINEERING DATA

Defendant's Evidence

R. D. Cooper and M. V. Dodge completed a survey of Malheur Lake about February 14, 1914 for private parties who contemplated a drainage project on the lake. (Abs. p. 904, l. 40 et seq.; p. 907, l. 8 et seq. This survey was not made with the elaborateness of the 1931 Pecore survey by the government in this case, but it has the distinct advantage of being an actual measurement of the depth of the water in the lakes as they actually existed in the area involved. The purpose was to secure information required as to canals, their location, depth, grade and nature of the bed generally, though not made accurately as to soil or vegetation conditions. The parties used skates on the ice, chained the distances, taking readings at 1200 feet, (Abs. p. 909, l. 31), established a base line, cut holes in the ice at those distances, and then measured the actual depth of the water, and also the depth of the water and mud. These measurements were placed upon a plat introduced in evidence herein as Defendant's Exhibit X-6. Thus the figures thereon marked 1.5-2.0 mean a water depth of 1.5 feet and a combined depth of water and mud of 2 feet. The elevation of the water was determined actually from the water surface as the water rose in the holes cut in the ice. No effort was made to get out to the edge of the Neal meander line or to follow it. (Abs. p. 908, l. 1-4) and hence depths were not taken in the vicinity of the Neal line. Some effort was made by the government to show that the water in the holes cut in the ice might

not be the true elevations of the lake surface, due to the fact that ice expands when frozen, but we think the effort unavailing, for obvious reasons. (Abs. p. 896, l. 18-20). This survey is described by M. V. Dodge (Abs. p. 894-897; p. 898-900; p. 904-910); by R. D. Cooper, (Abs. p. 901-902; p. 910-912); H. Z. Smith (Abs. p. 900-901); C. B. McConnell, attorney, (Abs. p. 902-904). They used the bench mark at the Narrows as their base, obtaining for it an elevation of 4096.20; a more accurate figure could have been obtained if they had closed their survey which they did not find it necessary for the kind of work they were engaged in. (Abs. p. 895, l. 34-36; p. 900, l. 1-18; p. 910, l. 34-38; p. 912, l. 40-41; Abs. p. 911, l. 15, Abs. p. 874, l. 6-7; p. 635, l. 21-23.)

The Pecore survey of 1931, which was a highly precise closed survey from which Plaintiff's Exhibits 3 and 4 with the contour lines thereon were made, gave the elevation of the Narrows bench mark as 4095.868. (Abs. p. 755, l. 7-8; p. 106, l. 24-25; p. 174, l. 6-7). Accordingly all elevations given by Cooper and Dodge must be reduced by .332 of a foot to give government datum as correlated to the Narrows bench mark, or substantially 4 inches. (Abs. p. 847, l. 6-7). As a matter of fact the difference between the government and state datum according to bench marks on the Haley ranch on the north side of the lake, an important reading by the state is only .09 of a foot on the 1914 survey by Cooper and Dodge (Abs. p. 874, l. 11), .28 of a foot on the 1922 survey (Id. l. 12) and .28 of a foot on the new bench mark at that place (Id. l. 13-14). See tables in Cooper report for the state engineer of 1922, Defendant's

Exhibit X-1, (Abs. p. 862, 869, l. 24, 25, 26).

Though Pecore tried to make some point of the fact that the Cooper-Dodge survey establishing the bench mark at the Narrows was 4096.20 instead of 4095.868, or .332 of a foot more, (Abs. p. 8-32), he admits there is only 4 inches difference between his and their elevations, Cooper states the difference is of no practical importance in this case, (Abs. p. 897, 898; p. 912, l. 16-26); Dodge stated the same thing, (Abs. p. 873, l. 25-31); and it should settle the matter when we note that L. T. Jessup the expert hydrolic engineer called by the government, the compiler of the Jessup report (Plaintiff's Exhibit 52, and appendix thereto), stated with reference to the difference between the state elevation at the Narrows of 4096.20 and the government elevation of 4095.868:

> "I do not regard the differences found as very serious or large." (Abs. p. 1079, l. 18-19).

It would seem quite evident that if we subtract .332 of a foot from all elevations cited by Cooper or Dodge and so reduce their elevations to government datum, we then have a highly accurate study of *actual water conditions* of the lakes, taken when the lake was in its normal condition, and not a series of deductions based upon synthetic lake, as it was in 1931, it then being dry for the first time in the memory of witnesses. Accordingly in this study of the engineering data compiled by Cooper and Dodge, we will make the proper deductions of .332 of a foot, or about 4 inches, so as to harmonize their figures with the 1931 survey, and determine what such figures show as to actual depth of the water in the lakes.

Appendix E

Cooper and Dodge in their 1913-1914 survey found the bottom of Malheur Lake to be 4089.6, which reduced to government datum by subtracting .332 of a foot is 4089.26. (Abs. p. 917, l. 22-23). Pecore found a small place consisting of 26.8 acres between elevations 4088.8 and 4089, which he encircled on Plaintiff's Exhibit 3 with a blue pencil. (Abs. p. 262-263; Report of the Special Master: Volume 2, p. 84). The figures in the blue area on Plaintiff's Exhibit 3A, being the deep open waters of Malheur Lake, give the area between 4089 and 4090, and show varying depths of the bed between such elevations or contours, so we can see that the elevation of the lake bed given by Cooper and Dodge in their 1913-1914 survey was substantially accurate. Dodge's elevation of the west side of the sand reef was 4094, or government datum of 4093.668; the flat westerly is 4091.6 or government datum of 4091.268. (Abs. p. 915, l. 28-29). An inspection of the sand gap contours and small insert thereon, on Plaintiff's Exhibit 4, show the substantial accuracy of Mr. Dodge's figures.

At that time, he took the water level in Springer's Spring and found it 4093.53. The government just before the trial of this case took the same elevation, and on Plaintiff's Exhibit 3 it is given as 4093.2, again a practically identical result, after deducting the difference of .332 between the state and government datum. (Abs. 915, l. 38).

Mr. Dodge gave the elevation of the northwest corner of the Narrows townsite as 4100.00 (Abs. 916, l. 15). The contour in Plaintiff's Exhibit 3, elevation 4100 passes through this point.

Dodge gives the elevation of the east end of bridge

at Narrows on planking as 4096.5 (Abs. 916, l. 17). The government datum is 4096.3. Dodge gives the elevation of the west end of bridge at Narrows on planking as 4096.8; the government's elevation is 4,-096.6. If we deduct from the two previous elevations .332 to reduce to government datum, it will readily be seen that the elevations are substantially identical.

The other elevations given by Dodge in Plaintiff's Exhibit "X-7" may be compared, namely Pelican Point north end top of ridge, Dodge elevation 4098.9 Pelican Point north end of and 600 feet west, bottom of lake, 4091.5. By examining Pelican Point near top end of ridge, which Dodge gave elevation 4098.9 we find that point is about 26 chains north and 7.8 chains west of the south quarter section corner of Sec. 20, T. 25 S., R. 33 E. The contour on Exhibit "3" of the northerly loop at that point, gives elevation 4099. This is within one-tenth of Dodge's survey. We then take Dodge's Pelican Point survey near north end of and about 600 feet westerly from the foregoing point, which Dodge gave as elevation 4091.5. On exhibit 3 the elevation of a point in this vicinity, 27 chains west and 14.3 chains north of the above described quarter corner has elevation 4091.5. The elevation of the lake bed is very uniform in this vicinity. The comparison is fair.

Unless you are comparing definite points, such as bench marks, it is always hard to say with any degree of certainty that you are comparing the same points. Mr. L. T. Jessup in speaking of the twelve points of zero depth on page 1093 of the Abstract, comes to the conclusion that there is a wide difference between Plaintiff's Exhibit 3 and Defend-

ant's Exhibit X-6. We have platted the twelve points to the best of our ability and in every instance where there appears to be a discrepancy it could be cured by shifting the point a short distance. In other words the differences are not, in our opinion, caused by erroneous elevations but by difference in location of the points in question. We believe the only place where just comparisons can be made are where we find large areas with small variation of elevation. Three such places exist. One is the central portion of the Malheur Lake west of Cole Island and south of the enclosure marked "Grain Field." A comparison of this area was made in the report of Cooper and Dodge, Abs. 1089.

Another occurs west of Pelican Island and north of the Cooper & Dodge base line. Consider the second line of sounding west of the east end of Malheur Lake, Def. Ex. X-6, beginning with the first sounding northerly from the said base line and going northerly, we have 2.8, 3.2, 2.8, 2.7, 3.2, 3.5, 2.8, 3.1, 3.3, 3.2, 3.2, 3.0 and 3.1 the last being the second sounding south of the 0.0 point and gives an average depth of 3.07 feet. Subtracting this from water elevation of 4094.30 we have the average elevation of the bottom as 4091.23. Taking the average of all elevations noted on Pl. Ex. 3 which fall inside the "92" contour and southerly of the road shown point marked "Corral and Pump" to the northerly end of Pelican Island, the elevations are 91.6, 91.7, 91.2, 91.2, 91.1, 91.2, 91.4, 91.2 and 91.6, making the average elevation 4091.35.

East of Pelican Island and north of Cooper & Dodge base line, first line of soundings west of the

east end of Malheur Lake, beginning at base line and going northerly, Def. Ex. X-6, soundings read 1.5, 1.5, 1.5, 2.4, 1.8, 1.5, 1.7, 1.8, 1.8, 1.8, 1.7, 1.8 and 1.6, average depth 1.72 feet. Subtracting from water elevation of 4094.268 we have the average elevation of the bottom as 4092.58. Taking all the elevations shown on Pl. Ex. 3 north of the Cooper and Dodge base line, east of Pelican Island, and south of the south line of Secs. 27 and 28 produced west, T. 25 S., R. 33 E., and west of the Neal meander line, we have 92.7, 92.8, 92.9, 92.8, or an average elevation of 4092.80.

Def. Ex. X-6, 5th line of soundings west of east end of Malheur Lake beginning at base line and running northerly we have 5.1, 5.1, 5.0, 5.1, 5.0 and 5.0 which brings us to the northerly side of the sounding contour "5.0" making an average depth of 5.05 feet. Subtracting from the water surface elevation of 4094.268 we have an average bottom elevation of 4089.25. This line of soundings happens to be very close to the line of elevations given on Pl. Ex. 3. Consider the extention southerly of the section line between Secs. 20 and 21, T. 25 S., R. 32½ E. north of Malheur Lake. The elevation nearest the Cooper and Dodge base line is the 5th one south of fence forming the south boundary of "Grain Field" and is given as 89.4, it is located about 6 chains southwest of the sounding on Cooper and Dodge base line listed above as 5.1. Beginning at this elevation and going northerly we have 89.4, 89.2, 89.1, 89.1, 89.2, and 89.2, the average being 4089.20, this last elevation point is about 7 chains northeast of the last point on the line of soundings given as 5.0 above. This elevation point may also be described as being 37 chains

south and 5 chains west of the letter "F" in "Grain Field." Pl. Ex. 3.

We may arrive at the elevation of the water surface of Malheur Lake as of February 1914 independent of any levels run by Cooper and Dodge as follows:

In the area west of Cole Island and south of the Grain Field shown on Plaintiff's Exhibit 3 an average of 6 elevations from said Plaintiff's Exhibit 3 gives	4089.20
An average of 6 soundings taken from Defendant's Exhibit X-6 in the same area gives	5.05
Elevation of water in Malheur Lake in Feb. 1914	4094.25
In the area west of Pelican Island and north of the Cooper and Dodge base line, an average of 9 elevations from Plaintiff's Exhibit 3 gives	4091.35
An average of 13 soundings from Defendant's Exhibit X-6 gives	3.07
Elevation of water in Malheur Lake in Feb. 1914	4094.42
The area east of Pelican Island and north of the Cooper and Dodge base line, an average of 4 elevations from Plaintiff's Exhibit 3, gives	4092.80
An average of 13 soundings from Defendant's Exhibit X-6 gives	1.72
Elevation of water in Malheur Lake in Feb. 1914	4094.52

There are no assumptions contained in the above reasoning, simply an average of actual soundings taken in January and February, 1914, added to actual elevations of the same ground found by Mr. Pecore in 1931. In any event, the elevation of 4094.30 arrived at by running levels from the Narrows, shows that it substantially checks with the engineering data acquired by Pecore seventeen years later in 1931.

When we remember that the only actual survey we have of the water level of Malheur Lake was that taken by Cooper and Dodge for Mr. McConnell in January and Februaty of 1914, and which results were placed upon the map, Defendant's Exhibit X-6, and the further fact that the evidence shows that the fall and winter months are the seasons of low water elevations in the lake, and when we find the actual measurements check as we find them with the study above shown taken from Exhibit 3, it is pretty apparent that Mr. Neal in fixing the meander line where he did, the mean of which Mr. Pecore testifies is 4093 elevation, pushed such meander line out into the lake as far as one could or reasonably should have done at that time, in a conservative attempt to place it at mean high water. The water innumerable seasons and regularly went to 4094, 4095, 4096, 4097, and higher as the testimony abundantly shows.

An examination of the depth of the water shown on Defendant's Exhibit X-6 are actual measurements. Taking the bottom of the lake as 4089.6, (government datum 4089.26), Cooper and Dodge found the water elevation in February 1914 in Malheur Lake was 4094.60, government datum .332 less or 4094.268. This level was taken when the evidence shows that

the water should be lowest, it being in the winter time before the spring breakup. Highly corroborating is the government published data mentioned by Jessup and shown on Figure 16, and page 67 of Plaintiff's Exhibit 52, showing the water in 1913 was at elevation 4094.39 on June 28, 1913 and went to 4094.86 in 1914. (See also Abs. p. 1071, l. 39-41; p. 1080, l. 5-21; p. 1081, l. 24 to p. 1085, l. 11.)

In the table on page 635 of the Joint Abstract M. V. Dodge gave various elevations of the water of Malheur Lake, which he actually found at different times between December 28, 1910 to May 21, 1918, and which show a minimum elevation in the dry month of December, 1910 of 4092.708 to 4094.668 in the wet month of July, 1913, (elevations given on said page 635 of the Abstract are here reduced to government datum.)

In 1922, the State Engineer of Oregon, who was one of a committee cooperating with the writer of this brief, in an attempted settlement between the United States and the State of Oregon by building a dyke across the lake substantially in the vicinity of Graves so-called ridge (Abs. p. 870, l. 11-14), employed R. D. Cooper to work up certain engineering data. He had Mr. V. Dodge install gages. The result of this engineering study is given in Defendant's Exhibit X-1, Abs. p. 862-871, the Report of R. D. Cooper to the State Engineer. A hydrograph is attached to this report. This report gives elevations of the lake at various points, to which we direct the court's attention. We call especial attention to the level of Haley's ranch. Scott Haley's place is shown on Plaintiff's Exhibit 3 and 3-A as being west of Graves so-

called ridge or islands. It is the same as Tract 18 on Plaintiff's Exhibit 22. As appears from page 75 of the Report of the Special Master: Volume 2, this tract has 302 acres in it; 240 acres are below contour 4093 or 79.4% of the whole tract; 48 acres are between 4093 and 4094 or 15.8%; 10 acres are between 4094 and 4095 or 3.3%; about 1.5% is above 4095. This is typical of other tracts in the western part of the lake, as the average of tracts 1-41, 41A, 44-46, shown on Plaintiff's Exhibit 22, being the area west of a line drawn from the mouth of the Silvies to the mouth of the Blitzen rivers is 78.17% below 4093, 14.12% between 4093 and 4094, 4.98% between 4094 and 4095 and 2.73% above 4095. (See Master's Report, Volume 2, page 78.)

The gage at the Haley place showed the water of Malheur Lake in 1922 rose to 4095.271, 4095.271 and 4095.339 respectively on the three Haley gages, government datum. (Abs. p. 865, l. 27-30; p. 874, l. 11-14, Pecore comparison table). Here we have irrefutable evidence of the height of the water in 1922 west of the Graves ridge, which isolates the eastern body of water from the western body, when the water falls below substantially 4092 as shown by the contour maps and as stated by Pecore. (Abs. p. 755, l. 16-20).

The Pelican Point gages were set as being representative of the main lake. (Abs. p. 863, l. 46-47). The Pelican Point gage showed water elevation of 4098.236, government datum. (Abs. p. 866, l. 32-37; p. 874, l. 26-31). It is possible this height was affected by wind action, as witnesses relate how wind sweeps water upward on easterly end of Malheur Lake.

On page 869 of the Abstract are given lake eleva-

tions for other years both at the Narrows and at Haley's place. They range from a low of 4093.268 to a high of 4094.768 at the Narrows, government datum; and a low of 4093.068 to a high of 4094.768 at Haley's place, government datum. These figures being reduced to government datum by subtracting .332 from the state elevations given.

On the hydrograph attached to Defendant's Exhibit X-1, the Cooper report of 1922, is platted various elevations of Malheur Lake, which can likewise be reduced to government datum by subtracting .332 of a foot therefrom. This graph shows the lake ranging from 4094 at the Narrows to 4094.4, near the mouth of Blitzen, government datum.

So here we have actual measurements as shown by gages installed in recent years showing that the waters of Malheur Lake rose in normal seasons of high water up to two feet above 4093. We have actual measurements of the lake itself.

The engineering evidence is not so complete as the testimony of the eye witnesses who gave a description of various places around the lake to which the water has risen in the high water seasons, and which testimony we have analyzed elsewhere under Exceptions 18. The witnesses are listed under subdivisions (b) and (c) thereof, and a succinct statement of their testimony is shown in the *Supplement* to this Brief, Appendix B and Appendix C.

Alabama.

Harvard v. State, 23 Ala. App. 228, 124 So. 912, 914.

California

Foss v. Johnstone, 158 Cal. 119; 110 Pac. 294.

Reynolds vs. Churchill Co., 187 Cal. 543; 202 Pac. 865.

Florida.

Broward vs. Mabry, 58 Fla. 398, 50 So. 826.

Ex Parte Powell, 70 Fla 363, 70 So. 392.

Martin v. Bush, 112 So. 274, 93 Fla. 535.

State vs. Gerbing, 56 Fla. 603, 47 So. 353, 22 L. R. A. N. S.

Georgia.

Boardman vs. Scott, 102 Ga. 404, 30 S. E. 982, 51 L. R. A. 178.

Illinois.

Dupue Rod, etc., Club v. Marliere, 332 Ill. 322, 163 N. E. 683.

Fuller vs. Shedd, 161 Ill. 462, 44 N. E. 286, 33 L. R. A. 146, 52 A. S. R. 380; followed in Hardin vs. Shedd, supra.

Hammond vs. Shepard, 186 Ill. 235, 57 N. E. 867, 78 A. S. R. 274.

Hardin vs. Shedd, 177 Ill. 123, 52 N. E. 380.

Schulte vs. Warren, 218 Ill. 108, 75 N. E. 783, 13 L. R. A. (N. S.) 745.

Trustees vs. Schroll, 120 Ill. 509, 12 N. E. 243.

Wilkinson v. Watts, 309 Ill. 607, 141 N. E. 383. Pistakee Lake.

Wilton vs. Van Hessen, 249 Ill. 182, 94 N. E. 134.

Indiana.

Martin vs. Evansville, 32 Ind. 85.

State vs. Tuesberg Land Co., 109 N. E. 530. No. riparian rights on non-navigable water, p. 541.

Stinson vs. Butler, 4 Blach. 285.
Stoner vs. Rice, 121 Ind. 151, 22 N. E. 875.

Iowa.

Carr vs. Moore, 93 N. W. 52, 119 Ia. 152, 97 Am. St. 292, 114 Am. St. Rep. 412.
McManus vs. Carmichael, 3 Ia. 1.
Noyes vs. Collins, 92 Ia. 566, 61 N. W. 250, 26 L. R. A. 609, 54 A. S. R. 571.
Peck vs. Alfred Olsen Constr. Co. (Ia.) 238 N. W. 416, 245 N. W. 131.
State vs. Jones, 143 Ia. 398, 122 N. W. 241.
State vs. Thompson, 134 Ia. 25, 26, 111 N. W. 328.

Kansas.

Dana vs. Hurst, 86 Kan. 947, 122 Pac. 1041.
Fowler vs. Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. N. S. 162, 117 Am. St. Rep. 534.
Jackson-Walker Coal & Material Co. vs. Hughes, 238 Fed. 457, 484.
State vs. Akers, 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916 B, p. 543, aff. Wear v. Kansas, supra.
State vs. Berk, 129 Kan. 645, 648, 649; 284 Pac. 386, 387.
Stogsdill v. Minor, 103 Kan. 790; 176 Pac. 643.
Warner v. Snook, the State of Kansas, Intervenor, 107 Kan. 345, 346; 191 Pac. 289.
Winters v. Myers, 92 Kan. 414, 418, 419, 420; 140 Pac. 1033, 1035.
Wood vs. Fowler, 26 Kan. 682, 40 Am. Rep. 330.

Kentucky.

Wilson vs. Watson, 141 Ky. 324, 138 S. W. 283, middle of river.

Louisiana.

New Orleans Land Co. v. Board of Levee

Com'rs., 171 La. 718, 132 So. 121, 123 (2). Lake Pontchartrain.

State of Capdevielle, 146 La. 106, 83 So. 421.

Maryland.

Linthicum vs. Shipley, 140 Md. 96, 116 Atl. 871, 23 A. L. R. 754, 769.

Massachusetts.

Atty. Gen. vs. Herrick, 190 Mas.. 307, 76 N. E. 1045.

Inhabitants of Lynnfield vs. Inhabitants of Peabody, 106 N. E. 877, 219 Mass. 322, Ann Cas. 1916D, 1200.

Stoneham v. Com., 249 Mass. 112, 144 N. E. 83.

West Roxbury vs. Stoddard, 7 Allen (Mass.) 158, ordinance of 1647.

Michigan.

Clute vs. Fisher, 65 Mich. 48, 31 N. W. 614. Mistaken decision, see State vs. Tuesburg Land Co., 109 N. E. 530, 537; 61 Ind. A. 555.

Rice vs. Ruddeman. 10 Mich. 125.

Minnesota.

In re Judicial Ditch Proceeding No. 15, 140 Minn. 233, 167 N. W. 1042.

Lamprey vs. Danz, 86 Minn. 317, 90 N. W. 578.

Lamprey vs. State, 52 Minn. 181, 53 N. W. 1139. 18 L. R. A. 670.

State vs. Korrer, 127 Minn. 60, 148 N. W. 617, 1095; 127 Am. St. Rep. 40; L. R. A. 1916C., p. 139.

Non-navigable and Dried-up Lakes—The owners of land bordering on the shore of a meandered non-navigable or dried-up lake own the bed of the lake in severalty. Their title extends to the center of the lake; the boundary lines of each abutting tract being fixed by extending, from the meander line on each side of the tract, lines converging to a point in the

center of the lake. (a). The mode of dividing the bed of dried-up lake among the abutting owners depends on the shape of the lake. (b). Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be the most suitable for adjusting riparian rights in the lake bottom along its sides and the use of converging lines would only be required at its two ends. (c). The giving of the beds of dried-up lakes to the riparian owners was originally a matter of favor or grace. (d).

(a) Lamprey v. State, 52 Minn. 181, 53 N. W. 1139; Shell v. Matteson, 81 Minn. 38, 83 N. W. 491; Hanson v. Rice, 88 Minn. 273, 92 N. W. 982; Scheifert v. Briegel, 90 Minn. 125, 96 N. W. 44; Markusen v. Mortensen, 105 Minn. 10, 116 N. W. 1021; State v. Korrer, 127 Minn. 60, 71, 148 N. W. 617; Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858; State v. District Court, 146 Minn. 150, 178 N. W. 595. See Huntsman v. Hendricks, 44 Minn. 423, 46 N. W. 910; Tucker v. Mortenson, 126 Minn. 214, 148 N. W. 60; Stewart v. Turmey, 237 N. Y 117, 142 N. E. 437; 23 A. L. R. 783.

(b) Scheifert v. Briegel, 90 Minn. 125, 96 N. W. 44; Markusen v Mortensen, 105 Minn. 10, 116 N. W. 1021; Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858; See Burton v. Isaacson, 122 Minn. 483, 142 N. W. 925; 17 Harv. L. Rev. 410; 10 Col. L. Rev. 82; 122 Am. St. Rep. 982.

(c) Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858.

(d) State v. District Court, 146 Minn. 150, 178 N. W. 595.

Mississippi.

Richardson vs. Sims, 118 Miss. 732; 80 So. 6.

Nebraska.

Crawford vs. Hathaway, 67 Neb. 323, 93 N. W. 781, 108 A. S. R. 668.

New Jersey.

Kanouse vs. Stockbower, 48 N. J. Eq. 42, 21 Atl. 197, 199.

New York.

Gouvenor vs. Nat. Ice Co., 134 N. Y. 355, 31 N. E. 865.

Granger vs. City of Canandaigua, 257 N. Y. 126, 177 N. E. 394.

Ledyard vs. Ten Eych, 36 Barb. 102.

Smith v. Rochester, 92 N. Y. 463.

Stewart v. Turney, 237 N. Y. 117, 142 N. E. 437, 31 A. L. R. 960.

The uncertainty in the state of New York as to the ownership of the beds of its lakes, and the lack of definite criteria to determine when the title is in the riparian owner and when in the state, is shown in the elaborate discussions by the following authors:

Title to Beds of Lakes in New York, 9 Cornell Law Quarterly, pp. 159, 288, 305, by Frederick D. Colson, Clerk of the Court of Claims of the State of New York.

New York and its Waters, 16 Cornell Lay Quarterly, pp. 1, 277, by William S. Andrews, Former Associate Judge of the New York Court of Appeals.

Ohio.

June vs. Purcell, 36 O. S. 396.

Shooting Club vs. Slaughterbeck, 96 O. S. 139.

Sloan vs. Biemiller, 34 O. S. 492.

State vs. Shannon, 36 Ohio State 423; 38 A. S. R. 599.

Walker vs. Board of Public Works, 16 Ohio 540.

Oklahoma.

Hale vs. Record, 44 Okla. 803, 146 Pac. 587.
State vs. Noles, 139 Pac. 943; 40 Okla. 479.
U. S. vs. Brewer Elliott Oil & Gas Co., 249 Fed. 609, 270 Fed. 100.
U. S. vs. Mackey, 214 Fed. 137.
Vickery vs. Yuhola Sand & Gravel Co., State ex rel. Intervenor, 12 Pac. (2nd) 881.

Oregon.

The State of Oregon is the owner of the bed of all navigable waters up to high water mark or line.

Cook vs. Dabney, 70 Or. 529, 139 Pac. 721.
Hume vs. Rogue River Packing Co., 51 Or. 237, 92 Pac. 1065.
Micelli vs. Andrus, 61 Or. 78, 83-84, 120 Pac. 737, 739, 740.
Pacific Elevator Co. vs. Portland, 65 Or. 349, 380, 389-402, 133 Pac. 72, 82.
State vs. Portland General Electric Co., 52 Or. 502, 531, 533, 98 Pac. 160, 161.

The state has ceded away its title to the lands below high water mark and down to low water mark, analagous to its sale of tide lands on the Willamette, Umpqua, Coquille and Coos Rivers in the State by various legislative acts. Laws of 1872, p. 129; Laws of 1874, p. 76; Laws of 1876, p. 69.

Lange vs. St. Johns Lumber Co., 115 Or. 337, 237 Pac. 696, 697.
Montgomery vs. Shaver, 40 Or. 244, 66 Pac. 923, 924.
Pacific Elevator Co. vs. Portland, supra.
Cook vs. Dabney, 70 Or. 529, 139 Pac. 721.

The riparian owner on non-navigable *streams* (not lakes) takes to the middle or median line thereof.

Micelli vs. Andrus, 61 Or. 78, 85, 120 Pac. 737, 740.

The stream or other body of water and not the meander line as actually run upon the ground is the boundary of the riparian owner.

Armstrong vs. Pincus, 81 Or. 156, 160, 158 Pac. 662, 663.

Tide lands are owned by the state.

Bay City Land Co. vs. Craig, 72 Or. 31, 35, 143 Pac. 911, 912.

Bowlby vs. Shively, 22 Or. 410, 418-419, 427; 30 Pac. 410.

Eagle Cliff Fishing Co. vs. McGowan, 70 Or. 1, 12, 137 Pac. 766, 770.

Fellman vs. Tidewater Mill Co. 78 Or. 1, 152 Pac. 268, 270.

Wharf rights when exercised have been recognized by state in owner on navigable fresh water rivers as appurtenant to riparian right.

Coquille Mill & Mercantile Co. vs. Johnson, 52 Or. 547, 551-2; 98 Pac. 132.

Lewis vs. City of Portland, 25 Or. 133, 160-162, 35 Pac. 256.

State vs. Portland General Electric Co., 52 Or. 502, 531, 533, 98 Pac. 132.

Accretion and reliction rules of law recognized in Oregon.

Cawlfield vs. Smyth, 69 Or. 41, 49, 138 Pac. 227, 230. (Until State changed its policy by legislation, riparian owner had right to accretion and reliction caused by recession of waters. Legislation pleaded in Amended Answer in case at bar changed the rule.)

French Glenn Livestock Co. vs. Springer, 35 Or. 312, 319, 58 Pac. 102.

Hanson vs. Thornton, 91 Or. 585, 589, 179 Pac. 494, 495-6.

Sun Dial Ranch Co. vs. May Land Co., 61 Or. 205, 218, 119 Pac. 758, 762. (This court holds that an accretion to be such must be raised as a permanent addition to the mainland.)

Taylor Sands Fishing Co. vs. Benson, 56 Or. 157, 162, 108 Pac. 126, 128.

Van Dusen Inv. Co. vs. Western Fishing Co., 63 Or. 7, 124 Pac. 677, 681.

The supreme court of Oregon has twice refused to recognize title of the upland owner to the center of Malheur Lake, which lake by the parties litigating therein (and which did not include the State of Oregon as a party) was conceded by both parties for the purpose of the case to be non-navigable.

Cawlfield vs. Smyth, 69 Or. 41, 49, 138 Pac. 227.

French Glenn Co. vs. Springer, 35 Or. 312, 319, 58 Pac. 102.

Pennsylvania.

Conneaut Lake Ice Co. vs. Quigley, 225 Pa. 605, lake navigable.

Foust vs. Dreutlein, 85 Atl. 68, (Pa.)

South Dakota.

Anderson vs. Ray, 37 S. D. 17, 156 N. W. 591.

Flisrand vs. Madson, 152 N. W. 796, 35 S. D. 457.

State vs. Deisch, 38 S. D. 350, 162 N. W. 365.

Tennessee.

State vs. Muncie Pulp Co., 119 Tenn. 47, 104 S. W. 437.

State vs. West Tennessee Land Co., 127 Tenn. 575, 158 S. W. 746, Ann. Cas. 1914B, p. 1043.

Texas.

Galveston vs. Menard, 23 Tex. 349.

Welder vs. State, 196 S. W. 868.

Utah.

Knudsen vs. Omanson, 10 Utah 124, 37 Pac. 250.

State vs. Rolio, 71 Utah, 91, 262 Pac. 987.

Vermont

Hazen vs. Perkins, 92 Vt. 414, 105 Atl. 249, 23 A. L. R. 748.

Virginia.

Norfolk City vs. Cook, 27 Gratt. 430.

Washington.

Bernot vs. Morrison, 81 Wash. 538, 143 Pac. 104, Ann. Cas. 1916D, p. 290.

Eisenbach vs. Hatfield, 2 Wash. 236, 26 Pac. 239.

Neterer vs. State, 98 Wash. 635, 168 Pac. 170.

Ortel vs. Stone, 205 Pac. 1055.

Proctor v. Sim, 134 Wash. 606, 236 Pac. 114.

Snively vs. State, 9 Pac. (2nd) 773; 167 Wash. 385.

State vs. Sturtevant, 76 Wash. 158, 135 Pac. 1035, 138 Pac. 850.

West Virginia.

Ravenswood vs. Flemings, 22 W. Va. 52, 61.

Wisconsin.

Boorman vs. Sunnucks, 42 Wis. 233, 235, 242, 246.

Delaplane vs. Chicago & N. W. R. Co. 42 Wis. 214; 24 Am. Rep. 386.

Diana Shooting Club vs. Lamoraux, 114 Wis. 44, 89 N. W. 880.

Diedrich vs. N. W. U. R. Co., 42 Wis. 248; 24 Am. Rep. 399.

Doemel vs. Jantz, 180 Wis. 225, 193 N. W. 393, 31 A. L. R. 969, 978.

Illinois Fuel Co. vs. Bilot, 109 Wis. 418, 85 N. W. 402, 83 A. S. R. 905.

In re Horican Drainage District, 136 Wis. 227, 116 N. W. 12.
Madison, City of vs. Schott, 247 N. W. 527.
Mendota Club vs. Anderson, 101 Wis. 479, 78 N. W. 185.
Munro v. Meilke, 200 Wis. 107, 227 N. W. 394.
Ne-Pee-Nauk Club vs. Wilson, 96 Wis. 290, 71 N. W. 661.
Peck vs. Alfred Olsen Construction Co., 245 N. W. 131.
Pewaukee vs. Savoy, 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836.
Priewe vs. Wis. State L. & I. Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645.

Title to Beds of Lakes—Annotations

52 Am. St. Rep. 394, 396.
47 A. S. R. 524.
83 Am. St. Rep. 402.
102 Am. St. Rep. 865.
122 Am. St. Rep. 982, 984.
Ann. Cas. 1914A, p. 481. Rule for apportionment for bed.
Ann. Cas. 1914A, p. 999, Rule for apportionment of bed.
Ann. Cas. 1918B, p. 1108.
Ann. Cas. 1916D, p. 299. Title to bed of non-navigable lake.
Ann. Cas. 1918E, p. 998. Rule for apportionment of bed.
18 L. R. A. 695.
25 L. R. A. 818.
26 L. R. A. 609.
33 L. R. A. 159.
43 L. R. A. 790.
50 L. R. A. 836
59 L. R. A. 324.
63 L. R. A. 296.

13 L. R. A. (N.S.) 745.
22 L. R. A. (N.S.) 337.
L. R. A. 1916C, 139.
L. R. A. 1917A, 1007.
L. R. A. 1918D, 607.
23 American Law Reports, 757, 1393, and supplementary notes.
31 A. L. R. 964.
54 A. L. R. 429.

January 14th, 1920.

Honorable B. L. Eddy, and
Committee on Commerce and Navigation,
State House,
Salem, Oregon.

Dear Sirs:

Pursuant to the provisions of Chapter 145 and Chapter 373, General Laws of Oregon, 1919, I have made an exhaustive study of the law relating to the title of lakes and lake beds in the State of Oregon, including the beds of shallow and dry lakes and the lands around lakes exposed to reliction and otherwise as provided by Subdivision 9 of Section 1 of said Chapter 145 and will gladly furnish information as to any mooted question which may arise under Senate Bill No. 24.

I undertook the investigation by direction of the State Land Board, and by virtue of the authority vested in me as Attorney-General, I employed as my special assistant for this work, Mr. L. A. Liljeqvist, attorney of Coos County, who had served me most faithfully for many years as deputy prosecuting attorney of that county and who later became district attorney. He made much of the field investigation upon which this report is based; likewise he has energetically and ably assisted me in all things in the matter of the examination as to the facts as well as in reaching my conclusions as to the law concerning the questions involved.

A great many affidavits have been secured from persons interested in the titles of Malheur Lake in Harney County and Silver Lake in Lake County, or who have knowledge of conditions, which are avail-

able for your examination or the examination of the members of the legislature. We sought to interview the oldest settlers in the state who had personal knowledge of these lakes for the longest time, and attempted to learn the condition when Oregon was admitted to the Union, at the date of the passage of the swamp land act of Congress, and also at all times subsequently. The affidavits taken state in detail what information we were able to secure. About twenty thousand acres of lands, more or less, the same being unsurveyed, are uncovered during very dry seasons in Malheur Lake and in the last two years about eight thousand acres of lands, more or less in Silver Lake. The investigation does not lead to the conclusion that the waters have permanently receded. These lands are of immense value, those on Malheur Lake being probably chiefly valuable for the raising of wild hay and those on Silver Lake for ordinary crops. Silver Lake will grow grain in great abundance in unusually dry years, such as have existed in three years out of about thirty, and the soil is of unsurpassed richness, and the lands are of great value. Certain land speculators have for various location fees located settlers on portions of the bed of Silver Lake, representing that the lands are owned by the United States government and can be homesteaded, and there is some conflict between them and some upland owners who claim to own to the center of the lake.

For many years meander line owners and some others have been harvesting many thousands of tons of hay from the bed of Malheur Lake during dry seasons, as a rise or fall of one foot of water, in many places covers or uncovers thousands of acres of lands.

There are various claims to portions of the lands inside of the meander lines of the lake. As an illustration one meander line owner who has approximately seven acres of patented lands, claims about seven hundred acres inside of the meander line, under claim of ownership to the center of the lake. Many claim that their lands diverge from the corners of their tracts owned along the meander lines to the point of a triangle in the center of the lake. Some others are squatting on the lands at certain places, claiming them under the United States land laws, and resist the claims of upland or meander owners. Others by adverse possession also deny the claims of various upland and meander owners. The United States also is apparently making some claim to all the lands inside of the meander line of Malheur Lake. Many persons have expressed their willingness to lease these lands from the State of Oregon if the State will establish and determine its title thereto. The present state of uncertainty has held back the whole community, and many are demanding that there be a speedy determination of the question of title, so that the community may develop its irrigation and drainage problems and projects and settle up the country.

There are many authorities which hold that the title of an upland owner on a non-navigable lake goes to the center of the lake:

Anderson v. Ray, 156 N. W. 591, (37 S. D. 17).
Bernot v. Morrison, 81 Wash. 538, (143 Pac. 104).
Brignall v. Hannah, 157 N. W. 1042, (34 N. D. 174).
Conneaut Lake Ice Co. v. Quigley, 225 Penn. 605, (74 Atl. 648).

Elder v. Johnson, 178 S. W. 396, (119 Ark 403).
Flisrand v. Madson, 35 S. D. 437, (152 N. W. 796).
Gouverneur v. National Ice Co., 134 N. Y. 355, (31 N. E. 865), 18 L. R. A. 695, (32 A. S. R. 669).
Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co., 102 Mich. 227, (60 N. W. 581, 25 L. R. A. 815).
Hardin v. Jordan, 140 U. S. 371, (11 Sup. Ct. 808, 35 L. Ed. 428), following state rule which was misunderstood. See:
Hardin v. Shedd, 190 U. S. 508, (23 Sup. Ct. 685, 47 L .Ed. 1156).
Hinckley v. Peay, 22 Utah 21, (60 Pac. 1012).
In re Tucker, 126 Minn. 214, (148 N. W. 60).
Inhabitants of Lynfield v. Inhabitants of Peabody, 219 Mass. 322, (106 N. E. 977).
John Hilt Lake Ice Co. v. Zahrt, 29 Ind., Appellate 476, (62 N. E. 509).
Johnson & Burr v. Elder, 92 Ark. 30, (121 S. W. 1066).
Kirkpatrick v. Yates Ice Co., 45 Mo. App. 325.
Land & Lake Ass'n v. Beardsley, 170 N. Y. Supp. 523.
Land & Lake Ass'n v. Conklin, 107 N. Y. Supp. 427.
Mill v. Bowers, I Miscl. N. P. 51.
Olson v. Huntamer, 6 S. D. 364, (61 N. W. 479).
Providence Forge Fishing & Hunting Club v. Miller Mfg. Co., 83 S. E. 1047, (117 Va. 129).
Rhodes v. Ciesell, 101 S. W. 758, (82 Ark. 367).
Richardson v. Sims, 80 So. 4, (Ann. Cas. 1916 D., 299, L. R. A. 1916 C., p. 150).
Ridgeway v. Ludlow, 58 Ind. 248.
Scherfert v. Briegel, 90 Minn. 125, (96 N. W. 44, 63 L. R. A. 296).

Shell v. Matteson, 81 Minn. 58, (83 N. W. 491).
Sherwin v. Bitzer, 96 Minn. 252, (106 N. W. 1046).
Smith v. City of Rochester, 92 N. Y. 463, (44 Am. Rep. 393).
State v. Superior Court for Cowlitz Co., 146 Pac. 609, (84 Wash. 252).

An examination of these cases show that many of them related to bodies of water so small that the same rule was applied as to non-navigable streams at common law.

As opposed to these cases, and setting forth as we believe the stronger reason and the broader public policy are following cases:

Boorman v. Sunnuchs, 42 Wis. 233.
Bristol v. Carrol Co., 95 Ill. 84.
Carr v. Moore, 119 Iowa 152, (93 N. W. 52).
Cleaveland v. Shedd, 72 N. E. 380, 117 Ill. 123.
Clute v. Fisher, 65 Mich. 48, (31 N. W. 614).
Delaplaine v. Chicago & N. W. Ry. Co. 42 Wis. 214, (24 Am. Rep. 386).
Diedrick v. N. W. U. Ry. Co., 42 Wis. 248, (24 Am. Rep. 399).
Hammond v. Shepard, 186 Ill. 235, (57 N. E. 867, 75 A. S. R. 274).
Hardin v. Shedd, 190 U. S. 508, (23 Sup. Ct. 685, 47 L. Ed. 1156), following the state law.
Hodges v. Williams, 95 N. C. 331.
Indiana v. Milk, 11 Fed. 389.
Lee Wilson & Co. v. U. S. 227 Fed. 827.
Marshall Dental Mfg. Co. v. Ia., 226 U. S. 460, (33 Sup. Ct. 168, 57 L. Ed. 300), affirming State v. Jones, 143 Ia. 398, (122 N. W. 241).
Mendota Club v. Anderson, 101 Wis. 479, (78 N. W. 185).
Nee Pee Nauk Club v. Wilson, 96 Wis. 250, (71 N. W. 661).

Noyes v. Board of Sup'rs. Harrison Co., 104 Ia. 174, (73 N. W. 780).
Noyes v. Collins, 92 Ia. 566, (61 N. W. 250).
Paine v. Woods, 108 Mass. 160.
Robinson v. White, 42 Mo. 209.
Schulte v. Warren, 218 Ill. 108, (75 N. E. 783).
State v. Thompson, 134 Ia. 25, (93 N. W. 52, 97 A. S. R. 292).
Waterman v. Johnson, 30 Mass. (13 Pick.) 261.
Welder v. State, 196 S. W. 868. (Texas).
Wilton v. Van Hessen, 249 Ill. 182, (94 N. E. 134).
Wright v. City of Council Bluffs, 130 Ia. 274, (104 N. W. 492).

The leading authorities, including the most eminent courts passing upon the subject in recent years, have gradually broadened the doctrine of navigable waters to include lakes which by reason of their expanse of surface, or conditions such as set forth in Senate Bill No. 24, are really public waters, and hold that it would be against the interests of the states and future generations to hand over thousands of acres of lands and waters to riparian owners.

Anderson v. Ray, 156 N. W. 591, 37 S. D. 17.
Broward v. Mabry, 50 So. 826, 58 Fla. 398.
Churchill v. Kingsbury, 178 Cal. 554, (174 P. 329).
Diana Shooting Club v. Husting, 145 N. W. 816. (156 Wis. 261).
Flisrand v. Madson, 35 S. D. 457, 152 N. W. 796.
Fuller v. Shedd, 161 Ill. 462, (44 N. E. 286).
Illinois Steel Co. v. Bilot, 109 Wis. 418, (84 N. W. 855).
Kinney on Irrigation and Water Rights.
Lamprey v. Danz, 90 N. W. 578, 86 Minn. 317.

Lamprey v. State, 52 Minn. 181, (53 N. W., 1139), a leading case.
State v. Akers, 92 Kan. 169, (140 Pac. 637).
State v. Cleveland & P. R. Co., 94 Ohio State 61, (113 N. E. 677).
State v. Deisch, 53 S. D. 560, (162 N. W. 365). (158 S. W. 746).
State v. Jones, 143 Ia. 398, (122 N. W. 241), affirmed in 226 U. S. 460, (33 Sup. Ct. 168, 57 L. Ed. 300).
State v. Korrer, 127 Minn. 60, (148 N. W. 617), a leading case.
State v. Thompson, 134 Iowa 25, (111 N. W. 328).
State v. West Tenn. Land Co., 127 Tenn. 575,
Welder v. State, 196 S. W. 868.
Wilton v. Van Hessen, 249 Ill. 182, (94 N. E. 134).

These cases last cited, if followed by our courts, or if the doctrine therein stated are promulgated by legislation, will establish the doctrine of public waters to Malheur Lake and Silver Lake, and the title to the lands thereof below ordinary highwater line in the State of Oregon. There is a distinction made in the cases between the lands lying under the waters of a non-navigable river or stream and the waters of lakes.

Under the provisions of Chapters 145 and 373, General Laws of Oregon, 1919, we expect and will attempt to establish the title of the State of Oregon to the lands under the waters of Malheur and Silver Lake and probably other lakes as we secure the facts. However like all litigation, the outcome depends upon the vision and broad mindedness of the judiciary, and the view which the individual members of the court take on public and private questions; furthermore,

litigation means the unsettled condition of these titles for from five to ten years in the future, while the counties need the policy which the state shall pursue to be determined as soon as practicable. Senate Bill No. 24, we undertook to draft with a broad vision and the future welfare of the State of Oregon ever in view and it embraces the best thought on the subject as exemplified, as we believe, in the decisions of courts in the last twenty years in this country, which have had most to do with lake conditions.

The question of the title of lake beds in Oregon, except that of lakes which are navigable in the broadest commercial sense, is an open question and the supreme court of this state has up to date found it unnecessary to determine the question. Whether the title to a non-navigable lake, or a lake which is navigable in a more restricted sense than that used in the federal cases, shall be determined in this state to be in the state or in the upland owners to the center thereof, is a matter of local law for each state to determine, either through legislation or judicial decision.

Archer v. Greenville Gravel Co., 233 U. S. 60, (34 Sup. Ct. 567, 58 L. Ed. 850).

Arkansas v. Tennessee, 246 U. S. 158, (38 Sup. Ct. 301, 62 L. Ed. 638).

Hardin v. Jordan, 140 U. S. 371, (11 Sup. Ct. 808, 35 L. Ed. 428).

Hardin v. Shedd, 190 U. S. 508, (23 Sup. Ct. 685, 47 L. Ed. 1156).

Kansas v. Colorado, 206 U. S. 46, (27 Sup. Ct. 655, 51 L. Ed. 956).

Kean v. Calumet Canal & Imp. Co., 190 U. S. 452, 460, (23 Sup. Ct. 651, 47 L. Ed. 1134).

McGilvra v. Ross, 215 U. S. 70, (30 Sup. Ct. 27, 54 L. Ed. 95).

Shively v. Bowlby, 152 U. S. 1, p. 40, (14 Sup. Ct. 548, 38 L. Ed. 331).

As stated in State v. Akers, 92 Kan. 169, (140 Pac. 637), Ann Cas. 1916B. 543:

> "If there is any one proposition upon which the courts have agreed with 'no variableness, neither shadow of turning', it is that the extent of the title of the owner of lands bordering upon navigable waters depends upon the local law. Whether under a patent from the United States the title extends to the center of the stream or lake or is limited to the margin thereof is everywhere held to be dependent on the law of the state."

The supreme court of the United States has time and again stated that the matter of the title of lands under waters is a matter for the state itself to decide, and that court has declared that what shall be deemed a navigable lake or navigable waters, (from which it will follow, if a navigable water, that title vested in the State of Oregon on its admission to the Union), for the purpose of fixing and determining title to its bed, is a local question of property for each state to decide. Thus in Donnelly v. United States, 228 U. S. 243, 262, the court said:

> "It results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property, is for the determination of the several states."

To establish the rule of public or navigable waters to the lakes of Oregon by litigation involves some time and great expense, and the determination of the question in favor of the state, depends upon the habits of mind, the individual ideas and the progressiveness of our courts; to establish this rule by legislation involves merely the bréadth of vision and the states-

manship of the legislators who will seek to preserve for the public benefit that which private persons would seek to grant to individuals.

The bill preserves any rights which the courts may hold are vested in any riparian owner, and the passage of this legislation will assist the State Land Board and this office immeasurably in accomplishing what the legislature directed by Chapters 145 and 373, Laws of 1919. Oregon's title to many thousands of acres of lands depends upon the passage of this act, or judicial decisions establishing the same doctrine of public policy set forth in the act.

Respectfully submitted,

GEO. M. BROWN,
Attorney-General.

NOTE: We have arranged the cases in alphabetical order for the convenience of the court in this case; and we have added the citations to the reporter system or state reports which were not contained in the original opinion by placing such citations within parantheses ().